No. 15495

United States
Court of Appeals
for the Ninth Circuit

SLEEPER LOUNGE COMPANY, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; CHARLES KUNZELMAN and JAMES A. ANDERSON,

Appellants,

vs.

BELL MANUFACTURING COMPANY, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—5-10-57

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LYON & LYON,
R. DOUGLAS LYON,
811 West Seventh Street,
Los Angeles 17, California.

For Appellee:

ELLIOTT & PASTORIZA,
225 Santa Monica Blvd.,
Santa Monica, California;

ADELBERT SCHAPP,
582 Market St.,
San Francisco, Calif.

In the United States District Court for the Southern District of California, Central Division

Civil Action No. 17779-WB

BELL MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

SLEEPER LOUNGE COMPANY (a Co-partnership, Consisting of Charles Kunzelman and James A. Anderson), CHARLES KUNZELMAN and JAMES A. ANDERSON,

Defendants.

COMPLAINT FOR TRADE-MARK INFRINGEMENT AND UNFAIR COMPETITION

Trade-mark Reg. No. 377,752

Now Comes the Plaintiff in the above-entitled action and for its complaint alleges as follows:

1. Plaintiff is a Corporation of the State of California, having its principal place of business in the City and County of San Francisco, State of California. [2*]

2. Defendant Sleeper Lounge Company, is a Co-partnership, consisting of Charles Kunzelman and James A. Anderson, and has its principal place of business in the County of Los Angeles, State of California, and within the Southern District of California, Central Division;

*Page numbering appearing at foot of page of original Certified Transcript of Record.

3. The Defendants, Charles Kunzelman and James A. Anderson, are individuals residing in the County of Los Angeles, State of California, and in the Southern District of California, Central Division;

4. This action arises under the Trade-mark Act of July 5, 1946, 60 Stat. 427; U.S.C. Title 15, Chapter 22, as hereinafter more fully appears, and is a suit for infringement and unfair competition with respect to a Trade-mark registered in the United States Patent Office;

5. Prior to 1940, Plaintiff's predecessor, Bell Manufacturing Company, a co-partnership composed of Joseph D. Bell and Pearl B. Bell, adopted and used the Trade-mark "Wonder Chair" in connection with the sale in interstate commerce of Reclining Chairs and Convertible Chair Beds;

6. On May 14, 1940, upon application duly made and prosecuted before the United States Patent Office, the said Patent Office duly granted to said Bell Manufacturing Company, a co-partnership, Registration Certificate No. 377,752, in accordance with the Act of February 20, 1905, as amended, the said Certificate of Registration covering the Trade-mark "Wonder Chair" in connection with Reclining Chairs and Convertible Chair Beds, in Class 32, Furniture and Upholstery; [3]

7. On or about the 19th day of July, 1947, Bell Manufacturing Company, a corporation, the Plaintiff in the present action, was formed under the

laws of the State of California, and subsequently acquired the assets, good will and the said Trade-mark from the co-partnership, as evidenced by an Assignment executed on the 23rd day of July, 1953, and recorded in the United States Patent Office on August 10, 1953, in Liber Z 236, Page 654;

8. The said Bell Manufacturing Company, a corporatioin, and its predecessor, Bell Manufacturing Company, a co-partnership, have continuously used the said Trade-mark on the goods specified, and on other goods of similar character, such as Love Seats, Twin Recliners, Cushioned Divans and Chesterfield Beds, in interstate commerce ever since its adoption prior to 1940, and are still using the said Trade-mark as aforesaid;

9. On September 14th, 1948, Bell Manufacturing Company, a co-partnership, caused the said Trade-mark to be republished in the Official Gazette of the United States Patent Office under the provisions of Section 12(c) of the Trade-mark Act of 1946;

10. On March 5th, 1954, the said Bell Manufacturing Company, a corporation, filed its combined Affidavit under the provisions of Sections 8 and 15 of the Trade-mark Act of 1946, and the affidavit was made of record in the registration file as evidenced by a Certificate from the Patent office dated April 24th, 1954. Under Section 15 of said Trade-mark Act, the right of said Bell Manufacturing Company to use said Mark in commerce for the goods specified has become incontestable, and under

Section 33 of the said Trade-mark Act, the said Certificate is conclusive evidence of the exclusive right of said Bell Manufacturing Company [4] to the use of the said Trade-mark on said goods in commerce subject to the provisions of said Section;

11. Defendants, and each of them, have, in interstate trade, and without the consent of plaintiff, used reproductions, counterfeits, copies, and colorable imitations of said registered Trade-mark, Registration No. 377,752, in connection with the sale, offering for sale, and advertising of goods in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods, as follows: the Defendants have recently adopted and are now using the Trade-mark "Wonder Bed" for a lounge or contour bed, which is adjustable for use as a bed, and a lounge, and have employed the Trademark "Wonder Bed" in the sale, offering for sale and advertising of their contour bed and lounge in commerce among the several States; more specifically, Defendants have caused to be inserted in the Los Angeles Times Home Magazine Section of December 5, 1954, and other publications, advertisements of their contour bed and lounge identified therein as the "Wonder Bed." The said Los Angeles Times is a newspaper of wide circulation and is sold in a number of States of the United States;

12. The said lounge and contour bed thus sold and distributed by the Defendants has substantially the same descriptive properties as Plaintiff's chair

bed, and belongs in the same Patent Office Classification, namely Class 32, Furniture and Upholstery;

13. Due notice has been given to the public by the Plaintiff of the registration of its Trade-mark "Wonder Chair" by displaying with the Trade-mark as used, the words "Registered U. S. Patent Office," and special notice has been given to the Defendants of the infringement of said Trade-mark in a letter [5] dated November 3rd, 1954, and addressed to Sleeper Lounge Company, 3279 Wilshire Boulevard, Los Angeles, California; and the Defendants have refused to cease using the infringeing Trade-mark after having acknowledged receipt of said letter.

Wherefore, Plaintiff prays:

(1) For damages, including profits of Defendants;

(2) For a preliminary injunction and for a permanent injunction enjoining:

(a) Unfair competition by Defendants;

(b) The use of the Trade-mark "Wonder" or any confusingly similar Trade-mark by Defendants, and,

(c) Infringement of Trade-mark Registration, No. 377,752 by Defendants;

(3) For its cost of suit, including attorneys' fees;

(4) That the court order all labels, signs, prints, packages, wrappers, receptacles and advertisements in the possession of Defendants, bearing the Registered Mark or any reproduction, counterfeit, copy, or colorable imitation thereof, and all plates, molds, matrices, and other means of making the same to be delivered up and destroyed, and

(5) Such other and additional relief as the circumstances of the case may require.

ADELBERT SCHAPP and
ELLIOTT & PASTORIZA,

By /s/ WILLIAM J. ELLIOTT,
Attorneys for Plaintiff.

[Endorsed]: Filed January 17, 1955. [6]

[Title of District Court and Cause.]

ANSWER

Come now the defendants Sleeper Lounge Company, Charles Kunzelman and James A. Anderson and, through their attorney and answering the complaint, allege as follows:

I.

Answering Paragraph 1 of the complaint, defendants admit the allegations thereof.

II.

Answering paragraph 2 of the complaint, defendants admit the allegations thereof.

III.

Answering Paragraph 3 of the complaint, defendants admit the allegations thereof. [7]

IV.

Answering Paragraph 4 of the complaint, defendants admit the allegations thereof.

V.

Answering Paragraph 5 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

VI.

Answering Paragraph 6 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

VII.

Answering Paragraph 7 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

VIII.

Answering Paragraph 8 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

IX.

Answering Paragraph 9 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

X.

Answering Paragraph 10 of the complaint, defendants state that they are without knowledge or information sufficient to form a belief as to the truth of the allegations thereof.

XI.

Answering Paragraph 11 of the complaint, defendants deny each and every allegation thereof. [8]

XII.

Answering Paragraph 12 of the complaint, defendants deny each and every allegation thereof.

XIII.

Answering Paragraph 13 of the complaint, defendants admit receipt by them of notice of infringement by way of letter dated November 3, 1954, addressed to Sleeper Lounge Company, 3279 Wilshire Boulevard, Los Angeles, California; further answering said Paragraph, defendants deny that they have infringed said trade-mark or have refused to cease using any infringing trade-mark; and further answering said Paragraph, defendants are without knowledge or information sufficient to form

a belief with respect to the truth of the remaining allegations thereof.

As Further and Separate Defenses, Defendants Allege as Follows:

First Defense

The trade-mark set forth in registration 377,752 is merely descriptive and in the public domain. Furthermore, the trade-mark has acquired no secondary meaning. Defendants further allege that if plaintiff owns any rights whatever in the alleged trade-mark, which defendants deny, said rights are limited to the specific mark, which is not infringed by defendants' mark.

Second Defense

That the trade-mark set forth in registration 377,752 is incapable of trade-mark significance. In this regard, defendants allege that the word "Wonder" has long been in general use by many manufacturers in describing their products and specifically has been used by many concerns engaged in the manufacture of love seats, twin reclining couches, divans, Chesterfield beds and lounges or contour beds. [9]

Third Defense

Defendants allege that they have made no trade-mark use of "Wonder" or "Wonder Bed" but have merely utilized such terms to describe products sold by them.

Wherefore, Defendants Pray:

1. That the complaint be dismissed and that the complainant take nothing thereby.

2. That defendants have their costs herein expended, including a reasonable attorney's fee.

3. For such other and further relief as the Court may deem proper.

SLEEPER LOUNGE COMPANY,

CHARLES KUNZELMAN and JAMES A. ANDERSON;

By /s/ R. DOUGLAS LYON,
Their Attorney.

Affidavit of service by mail attached.

[Endorsed]: Filed February 25, 1955. [10]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES BY DEFENDANTS

* * *

7. Please list in detail and identify each and every form of advertisement or sales media (including brochures, other [28] literature, television, radio, billboards, other sign displays, pamphlets, newspapers, and the like) in which you have used or authorized the use of the phrase "The Wonder

Bed" and/or the phrase "Wonder Bed," setting forth further when each use was commenced, how long each use has or did continue, and when each use was stopped, if stopped before the commencement of the above-entitled action.

Answer: As presently advised, defendants believe that the descriptive phrase The Wonder Bed was probably used in the following advertisements:

1. Brochures—15,000 printed for use as of August 31, 1954.

2. Truck Sides—Painted September 17, 1954, 1 truck, currently in use.

3. Billboards—3 in use, 1 since Oct. 15, 1954; 2 as of Nov. 8, 1954.

4. L. A. Times Home Magazine—Oct. 3, 1954; also Oct. 17, 31; Nov. 7, 14, 21, 28; Dec. 5, 12, 19, 26; Jan. 2, 9, 16, 23, 30; Feb. 13, 20, 27.

5. L. A. Examiner Pictorial Magazine—Nov. 7, 1954; also Nov. 14, 21, 28; Dec. 5, 12, 19; Jan. 2, 9, 16, 23.

6. Catholic Directory—October Publication date (annual).

7. Hollywood Reporter—Oct. 11, 1954, plus Oct. 26; Nov. 8, 23; Dec. 3, 9, 15.

8. Daily Variety—Oct. 7, 1954, plus Oct. 20; Nov. 5, 17, 29; Dec. 9, 14.

9. Playgoer—October, 1954, all weeks; also weeks of Nov. 22, 29; Dec. 6, 13.

10. Beverly Hills Newslife—Oct. 13, 1954; Oct. 18, 25; Nov. 8, 15, 22, 29; Dec. 6.

11. Canyon Crier—Oct. 14, 1954; Oct. 28; Nov. 11, 25; Dec. 9.

12. Christmas Mailers—1000 completed Dec. 9, 1954.

13. L. A. Herald Express—Nov. 25, 1954.

14. KCBH Radio Spots—Month of December, 1954.

15. Pasadena Star-News—Dec. 3, 1954; [29] Dec. 10.

16. Newport—Balboa News, Dec. 7, 1954.

17. Newport—Balboa Press, Dec. 2, 1954.

18. Hollywood Citizen News—Dec. 3, 1954; Dec. 10.

19. Valley Times—Dec. 3, 1954; Dec. 7, 10.

20. L. A. County Medical Directory (annual), December, 1954. [30]

* * *

SLEEPER LOUNGE COMPANY,

By /s/ CHARLES KUNZELMAN.

[Endorsed]: Filed April 19, 1955. [35]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause, having come on to be heard upon the Complaint and Answer and the Court having heard the testimony of the witnesses and the arguments of counsel, the Court does hereby enter its Findings of Fact:

Findings of Fact

1. Plaintiff is a corporation of the State of California having its principal place of business in the City and County of San Francisco, State of California. [147]

2. Defendant, Sleeper Lounge Company, is a co-partnership consisting of Charles Kunzelman and James A. Anderson, and has its principal place of business in the County of Los Angeles, State of California, and within the Southern District of California, Central Division;

3. The defendants, Charles Kunzelman and James A. Anderson, are individuals residing in the County of Los Angeles, State of California, and in the Southern District of California, Central Division;

4. This action arose under the Trade-mark Act of July 5, 1946, 60 Stat. 427; U.S.C. 15, Chapter 22, as hereinafter more fully appears, and was a suit for infringement and unfair competition with re-

spect to a trade-mark registered in the United States Patent Office.

5. Prior to 1940, Plaintiff's predecessor, Bell Manufacturing Company, a co-partnership composed of Joseph D. Bell and Pearl B. Bell, adopted and used the trade-mark "Wonder Chair" in connection with the sale in interstate commerce of Reclining Chairs and Convertible Chair Beds;

6. On May 14, 1940, upon application duly made and prosecuted before the United States Patent Office, the said Patent Office duly granted to said Bell Manufacturing Company, a co-partnership, Registration No. 377,752, in accordance with the Act of February 20, 1905, as amended, the said Certificate of Registration covering the trademark "Wonder Chair" in connection with Reclining Chairs and Convertible Chair Beds, in Class 32, Furniture and Upholstery; [148]

7. On or about the 19th Day of July, 1947, Bell Manufacturing Company, a corporation, the Plaintiff in the present action, was formed under the laws of the State of California, and subsequently acquired the assets, good-will and the said trademark from the co-partnership, as evidenced by an Assignment executed on the 23rd Day of July, 1953, and recorded in the United States Patent Office on August 10, 1953, in Liber Z 236, Page 654;

8. The said Bell Manufacturing Company, a corporation, and its predecessor, Bell Manufacturing Company, a co-partnership, have continuously

used the said trade-mark on the goods specified, and on other goods of similar character, such as Love Seats, Twin Recliners, Cushioned Divans and Chesterfield Beds, in interstate commerce ever since its adoption prior to 1940, and are still using the said trade-mark as aforesaid.

9. On September 14th, 1948, Bell Manufacturing Company, a co-partnership, caused the said trade-mark to be republished in the Official Gazette of the United States Patent Office under the provisions of Section 12 (c) of the Trade-mark Act of 1946;

10. On March 5th, 1954, the said Bell Manufacturing Company, a corporation, filed its combined Affidavit under the provisions of Sections 8 and 15 of the Trade-mark Act of 1946, and the Affidavit was made of record in the registration file as evidenced by a Certificate from the Patent Office dated April 24th, 1954.

11. Defendants, and each of them, have, in interstate commerce, and without the consent of Plaintiff, used reproductions, counterfeits, copies, and colorable imitations of Plaintiff's Trade-mark, Registration No. 377,752, in connection with the [149] sale, offering for sale, and advertising of goods in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods. In this regard, the Defendants adopted and used the trade-mark "Wonder Bed" for a lounge or contour bed,

which is adjustable for use as a bed, a lounge, and a reclining chair, and employed the trade-mark "Wonder Bed" in the sale, offering for sale and advertising of their lounge or coutour bed in commerce among the several States. More particularly, the Defendants identified their contour bed or lounge as the "Wonder Bed" in radio commercials, brochures, on truck side advertising, on billboards, and in at least fifteen different publications including the Los Angeles Times, Home Magazine Section, as further identified in Plaintiff's Exhibits 16, 17 and 18. Certain of the publications, including the Los Angeles Times, have wide circulation in a number of states throughout the United States. Further, in connection with the sale of Defendants' contour bed or lounge, Defendants caused a label to be affixed to the goods on which the goods are identified as the "Wonder Bed."

12. The said lounges or contour beds thus sold and distributed by the Defendants are embraced within the product line of goods specified in Plaintiff's Trade-mark Certificate and have substantially the same descriptive properties as Plaintiff's reclining chairs and/or convertible chair beds, and belong to the same Patent Office classification, namely Class 32 (Furniture and Upholstery).

13. Due notice was given to the public by the Plaintiff of the registration of its trade-mark "Wonder Chair" by displaying with the trade-mark as used the words, "Registered U. S. Patent Office," and special notice was given to the Defend-

ants of the infringement of said trade-mark in a letter dated November 3rd, 1954, and addressed to Sleeper Lounge Company, 3279 Wilshire Boulevard, [150] Los Angeles, California; and the Defendants refused to cease using the infringing trade-mark after having acknowleded receipt of said letter.

Conclusions of Law

1. Plaintiff's trade-mark "Wonder Chair" as shown on Registration Certificate No. 377,752, is valid and subsisting, uncancelled and unrevoked, and plaintiff is the owner thereof.

2. Defendants have infringed Plaintiff's valid trade-mark "Wonder Chair" as shown on Registration Certificate No. 377,752.

In accordance with the foregoing Findings and Conclusions, it is ordered, adjudged and decreed:

1. That a permanent injunction be granted against the Defendants from further infringement of the valid trade-mark, "Wonder Chair," owned by Plaintiff.

2. That judgment be allowed the Plaintiff in the sum of one thousand dollars ($1,000.00) for damages.

3. That the Defendants be ordered to pay attorney's fees to the Plaintiff in the sum of five hundred dollars ($500.00).

4. That the Defendants be ordered to pay costs of the suit in the amount of $178.20 to the Plaintiff.

Dated this 26th day of September, 1956.

/s/ THURMOND CLARKE,
United States District Judge.

Approved as to form:

/s/ WILLIAM J. ELLIOTT,
Attorney for Plaintiff.

Affidavit of Service by Mail attached.

Docketed and entered December 10, 1956. [51]

[Endorsed]: Filed September 26, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Sleeper Lounge Company, a co-partnership consisting of Charles Kunzelman and James A. Anderson; Charles Kunzelman and James A. Anderson, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered on this action on the 10th day of December, 1956.

Dated: 9th January, 1957.

LYON & LYON,

By /s/ R. DOUGLAS LYON,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 9, 1957. [153]

In the United States District Court, Southern District of California, Central Division

No. 17779-TC Civil

BELL MANUFACTURING COMPANY, a Corporation,

Plaintiff,

vs.

SLEEPER LOUNGE COMPANY, a Co-Partnership, Consisting of Charles Kunzelman and James A. Anderson), CHARLES KUNZELMAN and JAMES A. ANDERSON,

Defendants.

Honorable Thurmond Clarke, Judge, presiding.

REPORTER'S PARTIAL TRANSCRIPT OF PROCEEDINGS

January 25 and 26, 1956

Appearances:

For Plaintiff:
ADELBERT SCHAPP, ESQ.,
ELLIOTT & PASTORIZA, By
WILLIAM J. ELLIOTT, ESQ.

For Defendants:
LYON & LYON, By
ROBERT DOUGLAS LYON, ESQ.

Wednesday, January 25, 1956, 2 P.M.

WILLIAM F. BROWN

called as a witness on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: William F. Brown.

Direct Examination

By Mr. Elliott:

Q. Will you kindly state your full name?

A. William F. Brown.

Q. What is your address?

A. My business address?

Q. Both addresses.

A. My home address is 6048 Jumilla Avenue, Woodland Hills.

My business address is University of California at Los Angeles, School of Business Administration.

Q. Will you kindly state what position you hold at the University of California?

A. I am associate professor of marketing.

Q. Will you kindly state your educational background and degrees you have received? [3*]

A. I received the degrees of A.B. and M.A. in economics and business at the University of California at Los Angeles, and the doctor of philosophy degree in commerce at Northwestern University.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of William F. Brown.)

Q. When did you receive the doctor of philosophy degree in commerce—what year?

A. 1941.

Q. And what have you been doing since that year?

A. Teaching marketing and advertising at the University of California and at Northwestern.

Q. How many classes in advertising do you teach at the University of California?

A. Well, I usually have one class in advertising each semester.

Q. What is that class called?

A. Advertising Policies or Advanced Advertising.

Q. Have you ever written any articles which in any way are connected with advertising?

A. I have written articles on the Federal Trade Commission Act and false advertising, on the selection of brands, the factors influencing selection of brands by consumers.

I have done field research work on consumer motivation.

Q. Have you ever had any contact, prior to the past couple of weeks, with either Bell Manufacturing Company or Sleeper Lounge Company, or their personnel? [4] A. No, not that I know of.

Mr. Elliott: Your Honor, we would like to qualify Dr. Brown as an expert witness in advertising.

The Court: Yes, all right.

Q. (By Mr. Elliott): Dr. Brown, will you kindly state what you believe to be the function of

(Testimony of William F. Brown.)

a trade-mark or, as the public has called them, brand names?

Mr. Lyon: Just a moment, your Honor. At this time I would like to object. I finally get the gist of what he is going to testify to.

Earlier this year I directed the following interrogatory to the plaintiffs:

> Give the name and address of each witness who will be called upon to establish the existence of confusion in the trade as a result of the defendant's use of the phrase "The Wonder Bed."

The answer to that was: "Mr. Harold J. Miller."

Evidently they have since changed their mind, but they haven't notified me or made an effort to amend what they told me they were going to rely upon.

If I had known a witness of this type was going to be put on the stand, I would probably have wanted to take his deposition and have been at least in a position to obtain an expert witness of my own.

The Court: Well, we will give you time on that, if you [5] need it.

I will overrule the objection. If you need to do that, I will permit that.

Mr. Lyon: Thank you, sir.

The Court: No reflection on the witness on the stand, but when one side gets an expert, you know, usually the other side can get one, too, on short notice. I mean, I am not placing him in the handwriting class.

(Testimony of William F. Brown.)

Mr. Elliott: To repeat the question:

Q. Dr. Brown, from your knowledge of advertising and marketing, can you give us an idea of what you consider the function of the trade-mark or what as sometimes been referred to as a brand name?

A. From the point of view of the consumer, I think it is simply the means by which the consumer identifies or associates all the ideas that he gets about a particular manufacturer's product. It is a device through which he associates those ideas. Those ideas may come from advertising, from what people say, from what he learns from his own experience, from dealers telling him—any ideas that he develops about the products of a particular manufacturer are associated, I think, through a brand name, usually also a trade-mark.

Q. What is the method employed by manufacturers or corporations or companies to bring their trade-mark or brand [6] name to the attention of the public?

A. I suppose the most prominent method is the advertising in a variety of forms.

Q. If you were hired as a consultant to a company in connection with a product and you were told to advise them with respect to the layout of advertising, for example, in a newspaper, and further with respect to giving prominence to a trade-mark, what elements would you suggest that they consider to bring that trade-mark to the attention of the public—physical elements?

(Testimony of William F. Brown.)

A. In the particular ad?

Q. That is right.

A. The placing of the trade-mark in the ad, the size of the mark itself—that is, the name or the device, whatever it may be; what may be called the intensity either by the use of color blackness, as the case may be, to focus attention of the reader to the trade-mark; the position with respect to other information in the ad. We use terms called "motion" or "movement" at times. These are technical terms which refer to the device in an ad which may cause the reader to look in a particular direction in the ad. All those, at least, might be used.

Q. Would you say, then, that distinctive type would be such a device to focus attention?

A. Yes, that might be one. [7]

Q. Would you say reverse blocking would be such a device?

A. Yes, I think it is fairly commonly used.

Q. Would you say that framing a word or combination of words that is used as a trade-mark might be a way of focusing attention?

A. It is sometimes used.

Q. I show you an enlarged photostat of an advertisement put out by the Sleeper Lounge Company.

Mr. Elliott: I would like to identify this.

The Court: All right. That will be the next exhibit.

The Clerk: Plaintiff's Exhibit 16 for identification.

(Testimony of William F. Brown.)

Mr. Elliott: Yes, for identification. I think we might as well include it in the evidence.

Will you stipulate to this exhibit?

Mr. Lyon: I have no objection to its going in.

The Clerk: Exhibit 16.

(The document referred to, marked Plaintiff's Exhibit No. 16, was received in evidence.)

Q. (By Mr. Elliott): Again I show you an enlarged photostat of an advertisement, Plaintiff's Exhibit 16, which has been introduced in evidence. Will you tell me, Dr. Brown, when you first saw this advertisement? A. When you——

Q. Or a copy of it in smaller dimensions? [8]

A. When you placed it in front of me when you first visited my office, I think, about a week ago.

Q. Did you have any knowledge at that time with respect to the issues of this case?

A. Not specifically; only that it had something to do with identification.

Q. Will you tell me what your first question was at the time you saw this advertisement or the copy, the smaller copy, to me?

A. I asked you whether the identifying name was a "Sleeper Lounge" or a "Wonder Bed."

Q. Would you say that any words or combinations of words are given particular attention in this advertisement?

Mr. Lyon: Pardon me. I would like to object to the question. An expert can testify, he can give opinions, but he cannot, I do not believe, give opin-

(Testimony of William F. Brown.)

ions on the very ultimate issue that the court is to decide.

The Court: I will overrule the objection. I think he can answer that question all right.

Do you want the question repeated?

Maybe you had better repeat it.

Q. (By Mr. Elliott): Would you say that any words or combinations of words are given any particular attention in this advertisement?

A. Well, the words "Sleeper Lounge," and with the [9] "Company" attached, and "Wonder Bed," and somewhat less attention to "The Bed of Tomorrow" and "For Their Comfort Today!" But primary attention, I would say, or emphasis is given to "Sleeper Lounge" and then "Wonder Bed."

Q. For what reasons do you base your opinion that "Wonder Bed" is given particular attention?

A. The fact that it is in a heavy reverse plate, that is, black background with a light print, with white outlined printing—type.

Q. Are there any other reasons?

A. The fact that it is at the upper left-hand corner, at the obvious entry point, along with "Sleeper Lounge" in what could be called the typical headline position.

Q. Would you say that these factors are factors which are commonly used in connection with advertisements, with particular reference to trade-marks?

Mr. Lyon: I am afraid I don't understand the question.

Will you repeat the question, please?

(Testimony of William F. Brown.)

(The reporter read the pending question.)

The Witness: I would say that would be true of the brand name more than the trade-mark. The mark might be there or, evenly more commonly, I think, at the lower right-hand side of the page. But it sometimes appears in the headline, in the trade name, the identification device, almost aways or very frequently at the top. [10]

Q. (By Mr. Elliott): Would you say that Sleeper Lounge Company has used the words "Wonder Bed" in this copy of the advertisement, Plaintiff's Exhibit 16, in a descriptive manner?

Mr. Lyon: Your Honor, I object to that. That is what this court is called upon to decide. That is one of the ultimate issues the court is to determine.

The Court: No, I will overrule the objection. I will let him answer that question.

The Witness: If I were talking about this ad alone, I would say that it would be impossible to tell, because they might have, just as they used the phrase "The Bed of Tomorrow," used "Wonder Bed" in a purely descriptive sense, except that it—well, I know from my own fieldwork in this that it stands out, the association stands out much more clearly in the minds of consumers on this point. So that, coupled with the reverse plate, I think that there is—and my own reaction when you first questioned me, I would say that certainly I would doubt that it is used in a purely descriptive sense; about

(Testimony of William F. Brown.)

the same way that "Sleeper" is used in a descriptive sense with "Lounge" there, in a sense.

Q. (By Mr. Elliott): Would you say that the words "Wonder Bed" are used in good faith only to describe to consumers the article involved?

Mr. Lyon: Your Honor, I object to that. This witness may be an expert—— [11]

The Court: Yes, I will sustain the objection to that question.

Q. (By Mr. Elliott): If you were hired as a consultant to lay out the advertisement in connection with this product and you intended to use the words "wonder bed" to describe the product, would you include them in the layout as they are included here?

A. I wonder if that question could be expanded a little bit? What would I have been told about the purpose of the ad and what ideas I was to get across? I couldn't answer that without knowing something of the background of instructions that had been given in such a situation.

Mr. Lyon: Could the witness be instructed to answer the question, your Honor?

The Court: Well, he said he couldn't answer the question.

Mr. Lyon: I wish he would confine his answer to "I cannot answer."

The Court: Well, he didn't answer the question.

Mr. Lyon: I would like to move to strike that portion.

(Testimony of William F. Brown.)

The Court: All right, that may go out, then, as not being an answer.

Q. (By Mr. Elliott): Would you say that the words "Patents Pending" used in this portion of the reverse block have any significance relative to the words "Wonder Bed" from [12] the consumer's standpoint?

A. Well, the fact that they are also in a reverse plate, almost a banner effect—they are tied together —I think that probably they give a degree of official adoption, an official application for adoption, that might be confusing, I think, to a consumer. That is, they would—the term "Patents Pending" coupled with "Wonder Bed" implies, I think, that the name "Wonder Bed" has an official relationship to the product.

(Mr. Elliott showing document to Mr. Lyon.)

Mr. Elliott: I have another enlarged photostat, your Honor——

The Court: Do you want to mark that?

Mr. Elliott: Yes, and introduce it in evidence.

The Clerk: Plaintiff's Exhibit 17.

(The document referred to, marked Plaintiff's Exhibit No. 17, was received in evidence.)

Q. (By Mr. Elliott): Dr. Brown, I show you another enlarged photostat of an advertisement. Will you tell me whether or not you have ever seen this ad? A. No. I think not.

Q. Would you say that any words or combinations of words are given particular attention in this advertisement?

(Testimony of William F. Brown.)

A. Again, "Sleeper Lounge The Wonder Bed" and then "Sleeper Lounge Company," all are given, I would say, [13] prominent attention.

Q. Will you kindly state your reasons for saying that "Wonder Bed" is given prominent attention?

A. The size of the type and the rather distinctive outlined lettering.

Mr. Elliott: I have another exhibit here, your Honor.

Mr. Lyon: May I see that exhibit?

(Mr. Elliott showing document to Mr. Lyon.)

Mr. Elliott: I would like to introduce this exhibit in evidence.

The Court: All right.

The Clerk: Plaintiff's Exhibit 18.

(The document referred to, marked Plaintiff's Exhibit No. 18, was received in evidence.)

Q. (By Mr. Elliott): Dr. Brown, I show you Plaintiff's Exhibit 18, which is an enlarged photostat of an advertisement from a newspaper by Sleeper Lounge Company. Will you kindly state whether or not any words or combination of words are given prominent attention in this advertisement, and, if so, what are the words?

A. Well, right at the very top of the page, the headline, what we might call a headline, "if You really care this year Santa can bring"—and then—"Sleeper Lounge The Wonder Bed." And then again at the bottom of the page, "Sleeper Lounge Co." [14]

(Testimony of William F. Brown.)

Q. How would you say the words, "if You really care this year Santa can bring," are used, or what name are they given in advertising?

A. I think in this instance they would be called the headline. Rather clearly, it is the method used by the person who prepared the ad to attract attention, to get interest in the ad on the part of the consumer or the reader.

Q. Do those words, "if You really care this year Santa can bring"—are they meant to identify or to describe the product? A. No.

Q. What words do you consider in this ad are used to identify the product?

A. "Sleeper Lounge The Wonder Bed."

Q. Why do you say that those are the words? What are your reasons?

A. Well, again, because they have been coupled with the pictured sign, the size of the type, the distinctiveness of the type.

Q. Are the words "The Wonder Bed" in different type than the words "Sleeper Lounge"?

A. Yes.

Q. Are they in different type than any of the other type throughout the ad?

Mr. Lyon: Your Honor, I think the ad speaks for itself [15] as to what it shows. I don't see any purpose to be gained.

The Court: Yes, I will sustain the objection. I think he has testified sufficiently.

Mr. Lyon: Fine.

The Court: We might pause for a short recess.

Mr. Lyon: All right.

(Testimony of William F. Brown.)

(A recess.)

The Court: All right, have the witness resume the stand again.

Mr. Lyon: Would you be kind enough to read the last question, please?

(The reporter read the latter part of the record as follows:

("Q. Are the words 'The Wonder Bed' in different type than the words 'Sleeper Lounge'?

("A. Yes.

("Q. Are they in different type than any of the other type throughout the ad?")

Mr. Lyon: I object to that line of inquiry. The ad speaks for itself. It is obvious from the ad that it is in different types. I don't see where the gentleman's testimony is going to——

The Court: I will overrule the objection. I will let him answer.

You may answer. [16]

Mr. Elliott: I believe we were talking about Exhibit 17. Is that right?

Mr. Lyon: Exhibit 18, counsel.

Mr. Elliott: Exhibit 18 (showing exhibit to the witness).

The Witness: Yes, it is in different type.

Q. (By Mr. Elliott): In your earlier testimony, Dr. Brown, I believe you stated that conceivably the words "Wonder Bed" in this particular advertisement could be interpreted as being used possibly in a descriptive sense. On the basis, now, of the three advertisements you have now seen, as

(Testimony of William F. Brown.)

Plaintiff's Exhibits 16, 17 and 18, would you say that the words "Wonder Bed" are being used in a descriptive sense?

Mr. Lyon: Your Honor, I object to that as calling for the witness' opinion on something that the court is going to be required to decide, and as going beyond the proper scope of the interrogation of an expert witness.

The Court: No, I will overrule the objection. You may answer.

The Witness : Well, I think, rather obviously, there has been a tieup here between the name "Sleeper Lounge" and the "Wonder Bed" continuously throughout the ad, throughout the series of ads, and it has lost the descriptive value of the word "wonder," if there is any—has merged, I think, into simply an identifying device.

Q. (By Mr. Elliott): In forming an opinion as to the [17] manner in which the words "Wonder Bed" have been used by the Sleeper Lounge Company in Exhibit 16——

Do you see that (showing document to the witness)?

A. Yes.

Q. ——and Exhibit 18 (showing document to the witness), did you buttress your opinion in any way by further research?

A. Well, I conducted——

Q. Or fieldwork into the subject?

A. I conducted an informal field study, in which we interviewed consumers, showing them the paired ads, and attempting, as accurately as we could, to

get at the effect on them of the ads, that is, in terms
(Testimony of William F. Brown.)
of their reaction or their—the result of the ads in terms of associating the product and the names that were used or the terms that were used in the ads.

Q. Was any other piece of material used besides the ads? A. Questionnaires and a little card.

Q. Any other advertising matter?

A. On some of the test ads, we used the colored photograph of the billboard, on just a few.

Q. Is this the photograph, Plaintiff's Exhibit 15, to which you refer?

A. Yes, I think it was mounted, but it is approximately that same—a photograph of what appears to be the [18] same billboard.

Q. Will you explain to us how the survey was conducted, in your own words, please?

A. I began by making a rough field study myself. I shouldn't say "study," because that is what I call a preliminary or informal investigation, taking alternative questionnaires or questions and asking a few consumers in the area near the university to answer those questions, in order to develop an idea as to what questions were most valid, what the ideas of the consumers in a lengthy interview might be.

Then I worked out the revised and final form of the questionnaire and employed three of my students to conduct interviews, using that questionnaire, in the Santa Monica area, on a sample basis, which I can go into in detail, if you want. The reason behind it——

(Testimony of William F. Brown.)

The Court: I think that is a matter of cross-examination.

The Witness: Actually, the purpose of the study was, primarily, simply to reinforce my own ideas about the advertisements at issue, that is, what the effect on the consumer would be.

I think, when you first called me on the telephone about the whole matter, some eight or ten days ago, I gave you my opinion that it is very difficult for anyone, on any particular matter, to speak from—well, to use what I call [19] armchair reasoning and say very authoritatively just what a million consumers will think about a particular subject, even with a great deal of experience. I think the history of even the greatest men in the field of advertising and marketing indicates that they don't always guess right, and I always prefer to buttress my own thinking on the matter with a check in the field, and that is the prime purpose of the checking I did and had the students do for me.

Q. (By Mr. Elliott): As a result of this survey, would you say that your opinions were confirmed with respect to the manner in which "Wonder Bed" is used in the advertisements and with respect to the effect that such use would have on consumers?

Mr. Lyon: Your Honor, I will object to the question. There has been no testimony, that I know of, that has shown any effect on a consumer. However, even more so, this is a survey that was not run by the doctor. It was run by students of his who are not present for cross-examination. For all I

(Testimony of William F. Brown.)

know, they took the doctor's instructions, went out and filled them out themselves. I have no opportunity to check into what these students did, who they questioned on the questionnaire, the reasons for the answers given on the questionnaire; it is all hearsay, and hearsay compounded before it gets to the doctor. Now he has asked his opinion on it. [20]

The Court: I will overrule the objection. I think it goes to credibility.

You may answer.

Mr. Elliott: Would you read the question, please?

> (The reporter read the pending question as follows: "Q. As a result of this survey, would you say that your opinions were confirmed with respect to the manner in which 'Wonder Bed' is used in the advertisements and with respect to the effect that such use would have on consumers?")

The Witness: As I think I said right at the start, I feel that after looking at a few of the ads that the term "Wonder Bed" would probably be in the mind of many, not all by any means, but at least a reasonably sizable proportion—I would hesitate to venture a percentage; it might be 25, it might be 50, it might be 75; and I still wouldn't, because the sample that we chose was not a valid sample in the sense that it covered all of Southern California, and was not intended to do that. The only purpose of the study was to reassure me that when I made a

(Testimony of William F. Brown.)

judgment with respect to the two ads and said, the way the term "Wonder Bed" is used here, there is a good likelihood that at least a sizable number of consumers will think of this product as the Wonder Bed just as I think of an automobile as a Ford automobile, or something of the sort. [21]

Well, that was my feeling at the start, and after conducting the study I still feel, in fact, I am positive now, that a sizable number of customers will identify this particular product as the Wonder Bed. I don't think it necessarily will be the majority—in fact, I doubt it.

Mr. Elliott: That is all the questions, your Honor.

The Court: You may cross-examine, Mr. Lyon.

Cross-Examination

By Mr. Lyon:

Q. Doctor, in the course of advertising, in your experience, is it common practice for a concern to settle on particular ad and retain it?

A. Not very often. It is sometimes done.

Q. The usual practice, then, is for the concern in question to select one format for advertising and then change to another and change to another and change to another, over the course of time?

A. No——

Q. Maybe retaining the dominant features, but changing the format of the ad?

A. It depends on what you mean by "format."

(Testimony of William F. Brown.)

You said first one advertisement, and now you are using the term "format." Actually, it is very common, I think, for firms, for a particular season and sometimes for a long period, to [22] use a certain format, but then to change the details. I think now, for example, of the Cadillac series of advertisements, which I think are pretty well known; the format was about the same for, oh, a couple of years. De Beers' diamond campaign is another one.

Q. Then it would be a recognized custom in the advertising field for a person to make an ad using their trade name, using certain descriptive material underneath that, and then subsequently changing the descriptive material, retaining their trade-mark, and substituting different descriptive material for it? A. Yes, that is frequently done.

Q. That is frequently done, is it not? As a matter of fact, that is almost a custom in the industry or in your field?

A. Well, I don't think I would say that it is a custom, exactly. It is sometimes done. It sometimes isn't.

Q. What is the purpose of making such a shift?

A. A shift in descriptive material, you mean?

Q. Yes, sir.

A. Usually to get new ideas across to the consumers.

Q. Across to the purchasing public?

A. And also, I think, to avoid the difficulty which may arise if the consumer sees the same ad over and over again; you get resistance simply be-

(Testimony of William F. Brown.)

cause it is the same ad. [23] If the same consumer sees the same picture, he says, "Well, I have seen it. There is no point in reading it."

Q. So such a change would be made for at least two purposes, and possibly for others; one would be to avoid the ad becoming stale in the mind of the consumer, and, second, to emphasize new features of your device; is that correct?

A. Or new ideas about it.

Q. Or new ideas about it?

A. A host of new ideas might come in there.

Q. I believe you have testified that a trade name —I don't like that terminology; I like the terminology "trade-mark." Do the two mean the same, in your mind?

A. Almost, because, I think, primarily, not from the legal point of view but from the point of view of the consumer—and I think of one as identifying the product in the mind of the consumer, the product of a particular manufacturer.

Q. Which would you designate that?

A. Both.

Q. Well, there is a legal distinction, sir. I realize you are not a lawyer, so that you wouldn't know, but in the California Code there is a definite distinction between "trade-mark" and "trade name," and I use the term "trade-mark" because I think that is what you have been referring to.

You have defined such a device as a device by which [24] people associate their knowledge of a particular product with a particular individual or

(Testimony of William F. Brown.)

a particular concern. In other words, a trade-mark serves the office of designating the origin of a product; is that correct? A. Yes.

Q. May I show you this Exhibit 16 and ask you what trade-mark is used there?

A. My question was—I think I answered that, in a sense, by asking my very first question from Mr. Elliott; I asked him, "Which of these is the trade-mark?" That was the question I asked him.

Q. In other words, you can't tell, from looking at this, what the trade-mark is or what it is not?

A. No.

(Mr. Lyon showing document to Mr. Elliott.)

Q. (By Mr. Lyon): May I show you this advertisement and ask you what the trade-mark is in this ad?

I would like to identify this as Defendants' Exhibit A, your Honor.

The Court: Defendants' Exhibit A.

(The document referred to was marked Defendants' Exhibit A for identification.)

The Witness: My reaction would be, "The Electromatic 'Sleeper Lounge' Bed."

Q. (By Mr. Lyon): That is your opinion with respect to [25] this particular ad. Now, may I show you again Plaintiff's Exhibit 16?

Mr. Lyon: I would like to offer in evidence Defendants' Exhibit A, your Honor.

The Court: It may be received.

(Testimony of William F. Brown.)

(The document referred to, marked Defendants' Exhibit A, was received in evidence.)

Q. (By Mr. Lyon): I would like to show you Defendants' Exhibit A and Plaintiff's Exhibit 16 and ask how you can identify in one the trade-mark and in the other you cannot. I point out now that Plaintiff's Exhibit 16 contains "Sleeper Lounge the Wonder Bed" in one instance, and in the next ad it says "The Electromatic 'Sleeper Lounge' Bed." Is there something different in those ads?

A. Yes, I think there is. Here, "The Electromatic 'Sleeper Lounge' Bed Banishes Tension and Nervous Exhaustion" is a fairly complete phrase. The same is true here. In other words, under no possible interpretation is this a trade name or trade-mark. Nor is this (indicating). Nor is any other phrase or group of words.

Here there are two or three—that is, "Sleeper Lounge" here, "The Wonder Bed," and "Sleeper Lounge" here, that might be logically considered to be the trade name.

Q. What are the two or three alternatives, looking at this ad, what might be considered the trade name? [26]

A. "Sleeper Lounge" or "Wonder Bed."

Q. You would say these two could be separated, or is it "Sleeper Lounge" as one or "Sleeper Lounge the Wonder Bed" as the alternative?

A. I think it could be either one, separately or together.

(Testimony of William F. Brown.)

Q. Or combined? A. Yes.

Q. But in this instance it is only this one?

A. Well, it could be " 'Sleeper Lounge' Bed" or "The Electromatic 'Sleeper Lounge' Bed."

Q. I fail to see the distinction, Doctor, and I wonder if you could help me?

A. Again, when you say "trade-mark," I am thinking of trade name in the consumer's mind.

Q. You are talking now in the sense that the person—suppose Joe Doaks had bought one of these, and his brother wanted to get one, what would he ask for?

A. That is right. As a matter of fact, you just about took the question I used on my questionnaire and asked the respondents that same question. And I could say that in about——

Q. Well, I am not interested in that, Doctor, so we won't go into that.

I am just asking how you can tell the difference between [27] the manner in which this is used and the manner in which this is used, as to why one is the trade-mark and the other isn't.

A. The chief difference is by a process of elimination, as I indicated here. This is the only thing that might be used in that ad as an identifying device, I think (indicating). Here there are two (indicating). And I think——

Q. Taking an over-all look at that, what is the trade-mark? Or can't you tell?

A. Well, there is a confusing element here. Sometimes the trade-mark is the same as the company name, and sometimes it is different. That is

(Testimony of William F. Brown.)

the reason why I was not sure, when I first looked at it. For example, we have Chrysler automobiles, and——

Q. All right. You have the Chrysler Imperial. Let me ask you what the trade-mark is on that particular item. Is it "Imperial"?

A. I don't know, frankly. I understand they are beginning now to set it up as a separate brand name.

Q. By taking the word "Chrysler" off?

A. By taking the word "Chrysler" off.

Q. But when they put "Chrysler" and "Imperial" below it, the trade-mark is still "Chrysler," is it not?

A. Well, a person identifies it by—I would say in that case, if it is "Chrysler Imperial," he identifies it as [28] "Chrysler Imperial" as distinct from——

Q. "Chrysler" or another "Imperial"?

A. ——from some other "Chrysler" or another "Imperial."

Q. Is there any difference in "Sleeper Lounge the Wonder Bed"?

A. Very little difference there, I think—very little.

Q. So that if it is a trade-mark, the best you can say is that it is "Sleeper Lounge the Wonder Bed"? If it's a trade-mark at all. Now, this might be the trade-mark down here (indicating)?

A. That is right, it could be.

I see what you mean. Well, when I answered be-

(Testimony of William F. Brown.)

fore about "Imperial," if they separate it, they might use "Imperial" as the identifying device. And I don't know, frankly.

Q. You can't tell, then, normally, from looking at a document, what the identifying device is, or not, unless it is an obvious case; is that correct?

A. Well, let me put it this way. I couldn't tell for sure, in a situation of this sort, which one would be used by the company as its identifying device, the first time I had seen it. That is true.

Q. But you can from this Defendants' Exhibit A?

A. Well, I was fairly positive there, because by a process of elimination there seemed to be no other logical alternative. [29]

Q. I show you now a label, Doctor, and ask you if you can identify the trade-mark on that label?

A. Well, after our preliminary discussion, I know what it is. But again I would have to go back to my first question by Mr. Elliott, which I would say would be the name that identifies the product. Here, I would say probably that, since it is on the label, both names are used, that both of them constitute the trade-mark.

Q. By "both of them," you mean what?

A. "Sleeper Lounge the Wonder Bed."

Q. How about the two or three descriptive phrases below, then, which are set out in large type?

A. You mean the small type, do you not?

Q. Well, they are in large type. Then the other descriptive matter, although not as large as "Sleeper Lounge," which is the largest, "The Won-

(Testimony of William F. Brown.)

der Bed" next: How about "The Bed of Tomorrow" and "For Your Comfort Today"; can those be the type device to which you are referring? They are featured and prominent.

A. Well, I would think not, in this instance, for at least two or three reasons. One, the type is so small; it is almost the smallest in the ad. The phrases themselves, "The Bed of Tomorrow"—well, it is a sentence almost, there, an incomplete one—"The Bed of Tomorrow for Your Comfort Today." [30]

Q. Let's start with the sentence one line higher; doesn't that follow just as well?

A. Yes, I think, in a sense, that is true. In fact, you could start at the top.

Q. Start at the top? A. Yes.

Q. But if there is a designating mark on this label, it is either "Sleeper Lounge" or "Sleeper Loung the Wonder Bed"; is that correct?

A. I think so.

Q. I call your attention to Plaintiff's Exhibit 8 and ask you what the trade-mark is that is used in that advertisement.

Mr. Lyon: Incidentally, I would like to offer this as Defendants' Exhibit B.

The Court: Defendants' Exhibit B.

(The label referred to, marked Defendants' Exhibit B, was received in evidence.)

Q. (By Mr. Lyon): What is the identifying mark or trade-mark in that Exhibit 8, sir?

(Testimony of William F. Brown.)

A. I would say "Bell."

Q. "Bell" is? A. But——

Q. There is a possibility of it being "Bell's Wonder Chair," isn't there? [31]

A. That is right.

Q. At least "Bell" is a part of the trade-mark?

A. Again, the identifying factor in the consumer's mind—I don't want to use the term "trade-mark" in the technical legal sense, but——

Q. When you state in this ad that the identifying device is "Bell's," do you mean that in the same sense that you suggest that either "Sleeper Lounge" or "Sleeper Lounge the Wonder Bed" or "The Wonder Bed" were identifying devices in the defendant's ads? A. I think so.

Q. I show you now Plaintiff's Exhibit 7 and ask you again what the trade-mark or identifying device is that is illustrated in that ad?

A. Well, this—and perhaps I didn't see that under the label up above—but here there is a distinction in the sense that "Bell's Float-Rest Chair," "Bell's Wonder Chair," sets up some distinction in somewhat the same fashion that——

Q. Well, that would tend more to emphasize the word "Bell," wouldn't it? That would tend more to emphasize "Bell" as the identifying feature?

A. Well, more as the manufacturer.

Q. We agreed before, didn't we, that a trade name or device was something that identified the manufacturer? A. Source. [32]

Q. Source of origin?

(Testimony of William F. Brown.)

A. Somewhat—for example, this might be the "Chrysler Imperial," this is the "Chrysler New Yorker," this the "Chrysler Imperial," this the "Chrysler New Yorker."

Q. So in each of these instances the identifying mark is "Bell"?

A. It is the device which most clearly associates the—identifies the source of the item.

Q. I show you now Plaintiff's Exhibit 6 and ask you the same question: What is the trade-mark or identifying device used there?

A. Is this for the entire—you see, again I am confused a little bit by the fact that there are several different products in the one here. The association with the entire ad or with an individual product?

Q. I will ask you the question both ways.

A. Unquestionably, the products as a line are associated with the name "Bell"; individual items are associated with the particular——

Q. Particular subdescription and subtitle?

A. ——particular subdescription and subtitle.

Q. May I ask you, would you consider those the same as grade names? In other words, if you said "grade A" and "grade B," isn't that the same type of description as "Bell's" this chair and "Bell's" that chair? [33]

A. I would have to look at it a little.

Q. Take all the time you like, Doctor.

A. (A pause.) In this instance, of course, there is a specific caution to the reader that the trade-

(Testimony of William F. Brown.)

mark is "Wonder Chair." If that were not there, I would——

Q. Where do you find that, please?

A. (Indicating on document.)

Q. Yes. If that were not there, what would you think it would be?

A. The consumer, I think, would come away from the ad with the idea that Bell produces two kinds of products: One is a "wonder-chair" and one is a "chair bed."

Q. Thank you, sir. I show you now Plaintiff's Exhibit 4 and ask you what the trade-mark or identifying device in that ad is?

A. (A pause.) It would be "Bell's Wonder Chair" and possibly "Bell Slumber-Nest Sofa."

Q. I show you Plaintiff's Exhibit 5 and ask you again what the trade-mark or identifying device is on that piece of literature?

A. It is the same, that is, the identification from the consumer's point of view would be "Bell's Wonder Chair."

Q. So your testimony with respect to each one of these is that the trade-mark used is "Bell's Wonder Chair"; is that correct, Doctor? [34]

A. That is right.

Q. In no instance is the trade-mark "Wonder Chair"? A. Pardon me?

Q. In no instance is the trade-mark "Wonder Chair"? It is always "Bell's Wonder Chair"?

A. I think the consumer would identify it in that way.

(Testimony of William F. Brown.)

Q. That is correct. Now, may I show you——

A. May I——

Q. ——Plaintiff's Exhibit 15 and ask you what the identifying mark is—pardon me, sir—I ask you what the identifying mark is in that photograph?

A. The identifying mark?

Q. The identifying device or trade-mark which is illustrated on that billboard.

A. "Sleeper Lounge" or "The Wonder Bed."

Q. Now, I notice in each instance on the plaintiff's advertisements that where the word "Bell" was superimposed above "Wonder Chair" you came to the conclusion that the trade-mark used was "Bell's Wonder Chair," and whenever I show you one of defendant's ads wherein the words "Sleeper Lounge" are exhibited above the words "The Wonder Bed," you come to the conclusion that the trade-mark is either "Sleeper Lounge" or "The Wonder Bed," and I would like to hear your distinction between the two?

A. There is none in the sense in which I made the [35] statement before. I think the consumer would identify, in each instance, the product by either or possibly both those terms, paired terms. In other words, I would expect some consumers to go into a store and ask for "Bell's Chair," and others to go into a store and ask for "Bell's Wonder Chair," and others to go in and ask for the product "Wonder Chair," and I think the same is true here; some consumers will look at the manufacturer's name and place more emphasis on that,

(Testimony of William F. Brown.)

some on the term "Wonder Chair" or "Wonder Bed," and some will group the two.

Q. That is all your opinion, of course?

A. Oh, yes, except——

Q. May I ask, are you being compensated for your services in this case? A. Yes.

Q. And how long have you been compensated?

A. Well, I am—the compensation is based——

Q. On the amount of time you spent?

A. On the amount of time I spent in working on the particular project.

Q. How much time have you worked on the project?

A. Oh, approximately two days, I suppose; scattered series of hours, scattered over a week's time.

Q. Most of that work has been marshalling the questionnaires which your students have provided you with? [36] A. Primarily.

Q. How much time did you spend studying the ads, for example?

A. Oh, I would say probably two hours, three hours; perhaps less, perhaps more.

Q. Doctor, have you ever been employed other than as an instructor at the University of California at Los Angeles and at Northwestern?

A. Well, I have done consulting work, if that——

Q. Expert witness work?

A. I have been in that occasionally.

Q. And you have done consulting work; is that what you mean by "consulting work"?

(Testimony of William F. Brown.)

A. No; I have done other consulting work, too.

Q. Consulting work on what, sir?

A. Almost invariably on consumer field studies. For example, I have worked in connection with pay-as-you-go television in one study, for example. And a corporation was interested in——

Q. A television corporation?

A. The Telemeter Corporation, that is right. In a few other instances of similar sort: Ronson Lighter Company, in a particular case, and so on—Ronson Lighter Metal Works.

Q. I call your attention again, Doctor, to Plaintiff's [37] Exhibit 16, and I call your attention to the words "Patents Pending" off in the upper right-hand corner. As I recall your direct examination on this point, you said that those words would be confusing in the mind of a reader of this ad and would lend some officiality of some kind to the words "Wonder Bed"; is that paraphrasing your testimony accurately? A. I think so.

Q. Would you explain what you meant by that, sir?

A. Simply that the fact that the words "Patents Pending" are imposed on a black background—they are white on a black background, the phrase "Wonder Bed" is white on a black background; the black, almost ribbon-like strip there, tends to tie the two together.

Q. What is the result of tying the two together?

A. From the respondent's—the consumers, in other words, may look at the phrase and feel that the fact that "Patents Pending" is added or coupled

(Testimony of William F. Brown.)

with "Wonder Bed" to indicate that either the "Wonder Bed" is patented or that there is some official designation of the term "Wonder Bed"; in other words, "Patents Pending," meaning, in effect, that "Wonder Bed" is a patented product. In fact, some of them said that in the survey.

Q. Pardon me?

A. We had one or two mention that specific point in the survey. A couple of the respondents mentioned that point. [38]

Q. In this survey that you conducted, Doctor, you used three of your students to conduct the survey for you; you did not personally question anybody?

A. No. As I thought I made clear, I did. As a matter of fact——

Q. Preliminarily, before you made out your questionnaire; then you ran your survey, and you did nothing further from then?

A. No; I used that questionnaire and did some questioning with that questionnaire.

Q. Yourself?

A. Yes. It was only a couple, though.

Q. Whom did you question?

A. Well, I have the address of the person here. I have forgotten her name. I make it a practice usually of going in Westwood. I drove down one of the streets, stopped at a corner, went up, pushed the doorbell. In that case, no one was home. I went next door, and a respondent answered the doorbell and answered my questions.

(Testimony of William F. Brown.)

Q. How long did these students spend in conducting this survey?

A. In total, I imagine only a matter of three or four hours.

Q. How many people did they talk to in the course of three or four hours? [39]

A. Oh, I think we had about 25 or 30.

Q. 25 or 30 would represent the whole questionnaire, the whole survey that you made?

A. That is right.

Q. Doctor, have you ever conducted surveys, market surveys, in trade-mark cases before?

A. Yes.

Q. Have you ever been required or requested——

A. I shouldn't say "Yes" to a trade-mark case. In an unfair competition case.

Q. In an unfair competition case. What were you asked to prove by your survey in that case? Whether or not there was a palming-off or——

A. The question as to whether or not the particular product was being passed off as another, as a well-known brand.

Q. As a well-known product or a well-known brand? A. Well, more specifically——

Q. There are two types: One is where there is confusion between the two names, and one is where the articles are so similar that when people are selling they are selling——

A. It was the article.

Q. It was the article. In other words, they were

(Testimony of William F. Brown.)

simulating somebody else's article, taking it out and selling it? A. That is right. [40]

Q. In such a survey in this unfair competition case, how long did you spend on that survey?

A. I think a matter of about three days.

Q. About three days of your own time?

A. I think so, in directing the survey; spread, again, over a period of perhaps a week or ten days.

Q. I realize that. How many people were interrogated in that survey?

A. Approximately I am speaking from memory now, but I think 350 or 400 in this area and another three or four hundred in the San Francisco Bay area.

Q. Do you think a survey of 25 people in a town with the population of the City of Los Angeles gives you an accurate cross-section of opinion?

A. No, not at all.

Mr. Lyon: No more questions.

The Court: That is all.

Are you through with the professor?

Mr. Elliott: I would like to ask another question, your Honor.

The Court: Certainly.

Redirect Examination

By Mr. Elliott:

Q. Dr. Brown, did I suggest to you that you make the [41] survey? A. No.

Q. Did you suggest that you make the survey?

(Testimony of William F. Brown.)

A. Yes.

Q. What did you suggest as the reason for the survey?

A. I said that I didn't feel that I would be justified in making very flat statements about what people thought——

The Court: He said he wanted the survey to "buttress" his thought. That was the expression he used.

The Witness: Yes, your Honor.

Mr. Elliott: Thank you.

The Witness: And that—pardon me.

The Court: Was that it? That was the expression you used, wasn't it?

The Witness: Yes, your Honor.

The Court: I remembered the expression. It was a new expression. It made an indelible impression upon me. I knew there was such an expression, but I never heard it used that way.

Mr. Elliott: That is all.

The Court: Is that all?

Mr. Lyon: That is all, your Honor.

The Court: We might take a recess at this time. Counsel, you are through with the professor? [42]

Mr. Lyon: Yes, your Honor.

The Court: He may be excused.

In the morning there are always people to see me in these different cases. We will start at a quarter of ten tomorrow morning.

Mr. Elliott: Thank you.

Mr. Lyon: May I inquire, before we recess, whether there will be any further witnesses?

Mr. Elliott: Not as far as we are concerned.

Mr. Lyon: Would it be possible, your Honor, before we take the recess, to tie up the plaintiff's admission——

Mr. Elliott: We have some questions.

Mr. Lyon: Oh, you expect to call the defendant?

Mr. Elliott: Yes.

The Court: Make it a quarter of ten in the morning, then.

(Thereupon, at 4:30 p.m., an adjournment was taken until Thursday, January 26, 1956, at 9:45 a.m.) [43]

Thursday, January 26, 1956—9:45 A.M.

The Clerk: Bell Manufacturing Company vs. Sleeper Lounge, et al., No. 17779-TC Civil.

The Court: Did you want to call the defendant?

Mr. Elliott: Counsel and I stipulate that, in view of the fact that he is going to open up with the defendant on cross-examination——

The Court: You rest, then?

Mr. Elliott: We will rest and we will cross-examine instead.

The Court: Is that satisfactory, Mr. Lyon?

Mr. Lyon: Yes, your Honor.

The Court: All right. The plaintiff rests.

CHARLES KUNZELMAN

one of the defendants, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

The Clerk: State your full name, please.

The Witness: Charles Kunzelman.

Direct Examination

Mr. Lyon: At this time I would like to offer in evidence as defendants' next in order——

The Clerk: Defendants' C.

Mr. Lyon: ——as Defendants' Exhibit C, pages of the [44] local telephone directories, which have been torn from the full volume, which indicate various concerns in the City of Los Angeles using the word "Wonder" in their trade name.

The Court: All right. Defendants' Exhibit C.

(The documents referred to, marked Defendants' Exhibit C, were received in evidence.)

Mr. Lyon: I would like to offer as defendants' exhibit next in order——

The Clerk: Defendants' D.

Mr. Lyon: ——as Defendants' Exhibit D, this book of registrations of various trade-marks in the United States Patent Office, each of which involves the use of the word "Wonder" on goods in Class 32 in the Patent Office, which is the same class as the registration of the plaintiff, and which goods are identical or related to the goods that the plaintiff has used or purported to use the word "Wonder."

(Testimony of Charles Kunzelman.)

The Clerk: Defendants' Exhibit D.

(The document referred to, marked Defendants' Exhibit D, was received in evidence.)

By Mr. Lyon:

Q. Will you state your name, please, sir?

A. Charles Kunzelman.

Q. Would you generally outline your previous business experience?

A. I have had some connection with the furniture [45] business ever since 1946, after the war. I was, first of all, connected with the Fishman Furniture Manufacturing Company as office manager and assistant to the owner, that manufactured upholstered living room furniture. Later on, I established Civic Center Sales, a retail furniture and appliance business, and later the U. S. Merchandise Company up in San Francisco, a furniture and appliance business. And, in the latter part of '51, Civic Center Sales here locally, which was also a furniture and appliance business, retail.

Q. You are also at the present connected with the defendant, Sleeper Lounge?

A. Yes; I am a partner in that company.

Q. You are the Charles Kunzelman named as a defendant in this action? A. That is right.

Q. In addition to your association with the Sleeper Lounge organization at present, you have also other occupations with these organizations you previously mentioned you are still operating?

(Testimony of Charles Kunzelman.)

A. Yes. I am president of Civic Center Sales, Inc.

Q. So that the Sleeper Lounge represents a sideline in your normal course of business?

A. It has up to now, yes.

Q. A new business you are trying to [46] develop? A. Yes.

Q. It is not your principal source of income, is it? A. No.

Q. When was the defendant, Sleeper Lounge, formulated? A. On or about June, 1953.

Q. Your partner in this business is Mr. Anderson? A. James A. Anderson.

Q. Is he active in the business?

A. He hasn't been very active ever, and just off and on, to a limited extent.

Q. So that as far as this particular organization is concerned, you are the one who has been managing it? A. That is right.

Q. How many employees do you have at Sleeper Lounge?

A. One full-time employee, Kay Randall, who is in the office at all times, and then we have other, part-time help on occasion, and that has varied from one to four, depending on the season or our activities.

Q. And what kind of activities would these additional employees——

A. Additional activities, for instance, would be those such as the Home Show. We would show our product there.

(Testimony of Charles Kunzelman.)

Q. That would be demonstrating?

A. Yes. The Cavalcade of Health, recently held here [47] in Los Angeles——

The Court: I can't quite hear you.

The Witness: The Cavalcade of Health, recently held here at the Los Angeles County Fair at Pomona.

Q. (By Mr. Lyon): What do the defendant, Sleeper Lounge's activities consist of? Do they manufacture, sell, use, or what do they do?

A. Well, the Sleeper Lounge Company sells the product. We have, on a contractual basis, the product made for us by Thorpe & Draper, who are primarily mattress manufacturers. They make the product for us on a contractual basis, and we sell it—promote it.

Q. In accordance with your instructions as to size and so forth? A. Yes.

Q. Do you keep any inventory on hand?

A. Just the floor samples that we have of different types of mattresses and sizes. You see, we make these from twin size up to full size, queen size, king size.

Q. In accordance with what the customer requires? A. Yes, that is right.

Q. I will show you at present what appears to be a brochure, and ask you if you can identify that?

A. Yes; that is a brochure that we put out some time in 1954. [48]

Mr. Lyon: May I have this marked as a defendants' exhibit?

(Testimony of Charles Kunzelman.)

The Clerk: Defendants' Exhibit E.

Mr. Lyon: And offer the same in evidence, your Honor.

The Court: It may be received.

(The descriptive folder referred to, marked Defendants' Exhibit E, was received in evidence.)

Q. (By Mr. Lyon): Referring now to Defendants' Exhibit E, would you describe the construction of the product of the Sleeper Lounge Company in detail, both as to how it is made and as to how it operates?

A. Our product is a substitute for a box spring and a mattress. It is a box spring and a mattress, with a mechanism attached to the underside of the box spring, in a box, which box does not show when the bed is made up; and this, as I previously mentioned, we can make this in any bed size: Twin size, full size, queen size, king size, or special sizes. And it can either be on casters, as a Hollywood bed, or it can be put into a regular bedstead, as pictured on this particular brochure, or in front of a headboard. In other words, it can be used any way that a box spring and a mattress can be used. And it is electrically controlled with two motors; one actuates the foot, and one actuates the head. So that a person lying in bed can actuate it and move it into any position he desires. It goes into all of the positions [49] of a hospital bed, and can, therefore, change your bed to a reading position, looking at

(Testimony of Charles Kunzelman.)

television, resting in bed, having the feet up, or anything that you want, for your comfort or for your health.

Q. Does that device described in that brochure, or the device you sell, ever assume the position of a chair? A. No, it does not.

Q. Always a bed? A. It is always a bed.

Q. Is that device ever upholstered?

A. No, sir; it always comes covered with a mattress ticking, the same as any mattress or any bedstead.

Q. So that the manner in which you sell the device, it looks from outward appearances just like a mattress and box spring?

A. Like a mattress and box spring and frame, yes; that is what it looks like.

Q. Is anyone else, to your knowledge, making a device of similar characteristics?

A. No, we were unique. The only thing it could be likened to is a hospital bed, except the hospital bed looks differently, whereas this can be used in the home and looks no different than an ordinary box spring and mattress. But there is nothing of that nature that has ever been on the market before. [50]

Q. To your knowledge?

A. Yes, that is right. This product is unique.

Q. How is this product sold, Mr. Kunzelman?

A. Primarily, we have sold it through our—directly from our location at Wilshire Boulevard. That is, in itself, a step in the process of merchan-

(Testimony of Charles Kunzelman.)

dising it. In other words, outside of the Los Angeles area, we are now starting to sell through stores; but in the Los Angeles area, we still sell it directly ourselves.

Q. How is the normal sale handled? How does it come about, in the first place, and how is it handled within your organization?

A. People hear of it either through friends who have them or through the advertisements which we have published in the newspapers and through other advertising media, or at shows where we have shown it, and then they try it, see it, come down to our store, and usually there is a considerable amount of time involved in a sale, because it is a high-priced item that is not an impulse item. They don't buy it the first time they see it. They think about it a long time. It is a product that looks good to them, but it costs a lot of money, and they take a lot of time, sometimes as much as a year or longer, before they finally buy it.

Q. In other words, a customer with your organization will either phone you or write you a letter or come in the [51] store; I presume those are the only ways they ever contact you. Do you ever make a sale by virtue of somebody walking in the door or writing or just phoning up and saying, "Deliver one of these to me"?

A. There has been one of the early sales that we made, for instance, to Bob Burns, who had been looking for us for months, who had heard of my product and had been wanting something of that

(Testimony of Charles Kunzelman.)

nature, and he called up one day and asked for brochures to be sent him, price list. Then he called back half an hour later, said, "Never mind sending the brochures. Just send the bed. I have been waiting for it long enough. I don't want to wait any longer."

But normally that is a very rare occurrence. Usually they do investigate it to a considerable extent because of the fact that it is a new product; they want to assure themselves it is a good product, that it is something that will hold up, something that will do what they want of it.

Q. Well, to a large extent that is dictated by the price of this item, too; is that correct?

A. That is right.

Q. I show you now what purports to be a price list of your organization and ask if you can identify that? A. Yes; that is a retail price list.

Q. Is that your current retail price list?

A. That is our current retail price list. Just a [52] moment. Let me see the date on that.

(Mr. Lyon handing the witness a document.)

The Witness: Yes, it is.

Q. (By Mr. Lyon): Your prices have, of course, over the time your organization has existed, changed, have they not?

A. Slightly; not very greatly.

Q. They have tended to go up and down?

A. They have gone up.

Mr. Lyon: May I have that marked as defendants' exhibit next in order, your Honor?

(Testimony of Charles Kunzelman.)

The Clerk: Defendants' F.

Mr. Lyon: I would like to offer it in evidence at this time, your Honor.

The Court: It may be received.

(The document referred to, marked Defendants' Exhibit F, was received in evidence.)

Q. (By Mr. Lyon): I note by this price list, Mr. Kunzelman, that you sell a "3/3 (Twin) Standard Complete With Innerspring Mattress" at $329.50. Is that the cheapest you will sell one of these devices with a mattress?

A. Yes, that is right.

Q. You also sell them without the mattress; is that correct?

A. Yes, if they have a mattress which can do the work. [53]

Q. Does that require a special type of mattress?

A. In an innerspring, yes. Not very many innersprings would stand up under the bending they go through.

Any foam mattress they happen to have will serve just as well as any other.

Q. I see. And without the mattress, in the event the customer has the ordinary foam mattress, your minimum price for one of these devices, the "3/3 (Twin) Standard," is $269.50; is that correct?

A. That is correct.

Q. The prices, then, go up in accordance with the increased size of the bed?

A. That is right.

(Testimony of Charles Kunzelman.)

Q. May I ask you this: After you have contacted a customer and they want one of these devices, it is necessary for you then to order one of these from Thorpe & Draper; is that correct?

A. That is right.

Q. You don't carry them in stock, so that you would have to get the information from the customer as to the size of bed he had and what he wanted and then order it for him, and then——

A. The size and the firmness; in other words, on mattresses and box springs there is also the matter of firmness. In other words, people like different firmnesses, all [54] the way from soft to orthopedic hard. So, therefore, we specify the degree of firmness they want the mattress, and size, and whether it is to be hung in a regular bedstead or whether it will be on casters to be used in front of a headboard.

Q. In other words, each one of these devices you sell, with the possibility of the one exception that you have already mentioned, is custom made?

A. Yes. We occasionally have sold one off the floor, somebody in a hurry, if we happened to have what they wanted. In other words, if we have a twin-size bed with a full mattress, for example, on the floor that we use as one of our demonstrating models, and if somebody should, by reason of health or some reason, be in urgent need of one, and if that particular model and size suited them, we have in cases given them from our models in such instances.

Q. But the great majority of your sales are over

(Testimony of Charles Kunzelman.)

a period of negotiations with the customer, finding out what he precisely wants, ordering that, and then filling the order; is that right?

A. Yes, that is right.

Q. When the Sleeper Lounge partnership was formed, what trade-mark was adopted for use on your goods? A. Sleeper Lounge.

Q. Have you used that trade-mark on all of your goods [55] since the formation of your partnership? A. Yes.

Q. Have you used any other trade-mark?

A. No.

Q. I would like to show you now what purports to be an advertisement of your organization and ask you if you can identify that? A. Yes, I can.

Q. When was that ad circulated, approximately? Is that one of your early ads, or one of your later ads?

A. That is an earlier one. That was Connie Russell that we used, I would say, about the early part of 1954.

Q. That was when you first started to put these things on the market; is that correct?

A. Yes, that is right.

Mr. Lyon: May I have this marked for identification next in order?

The Clerk: Defendants' G.

Mr. Lyon: I would like to offer it in evidence.

The Court: All right.

(The document referred to, marked Defendants' Exhibit G, was received in evidence.)

(Testimony of Charles Kunzelman.)

Q. (By Mr. Lyon): I show you another of what purports to be an ad of your organization and ask if you can identify that, sir? [56]

A. Yes, sir; that is one of our ads.

Q. When would that ad have been circulated, approximately?

A. Either in the latter part of 1953 or the early part of 1954.

Q. Approximately the same time as the advertisement, Exhibit G, the last one I showed you?

A. Yes.

Mr. Lyon: I will offer this as Defendants' Exhibit H in evidence.

The Clerk: Defendants' Exhibit H.

(The document referred to, marked Defendants' Exhibit H, was received in evidence.)

Q. (By Mr. Lyon): Now, Mr. Kunzelman, after you had circulated advertisements of the type of Exhibits G and H, you changed your advertisements, as I understand it, to the type illustrated by Plaintiff's Exhibits 16, 17 and 18; is that correct?

A. That is right.

Q. Why did you make that change, sir?

A. Well, there are several reasons, actually. One of them is the fact that we have a new product and we have to tell our story in many ways to get it across to different people, to educate them as to what we have and what it does. Therefore, that plus the fact that people do grow tired of [57] the same ad makes it advisable, from the standpoint of my

(Testimony of Charles Kunzelman.)

own knowledge and the advice of advertising men, to change ads periodically and bring out different features and facets of your product.

There was another reason also, and that is the fact that my own advertising agency and several other advertising agencies I discussed it with, that were at that time soliciting my business to get my account, stated that there should be some supplemental information put there to get across the idea that it was a bed, in other words, the "Sleeper Lounge" name itself, because there were so many lounges on the market of the living room type of furniture that some people, without looking further, might just presume it was another piece of living room furniture, and that we must get across the idea that it is a bed. So, therefore, we were looking for some descriptive phrase in connection with using the word "bed."

Do you want to know how we happened to hit on "Wonder"?

Q. No, I will get to that.

Referring now to Defendants' Exhibit E, is this representative of the next type of advertising you utilized? A. That is right.

Q. I note there that you have incorporated the phrase "The Wonder Bed" and below that "The Bed of Tomorrow for Your Comfort Today." When you adopted the advertisement, were those phrases suggested by the advertising agency or arrived [58] at in conference with the advertising agency as de-

(Testimony of Charles Kunzelman.)

scribing to the public the nature of the product you were selling?

A. Yes, in combination with the advertising agency.

"The Bed of Tomorrow for Your Comfort Today" was solely the suggestion of the advertising agency.

"The Wonder Bed" was my suggestion, based on a suggestion my wife made one evening when I was working with different words that would describe it. I mean, I was toying with "Electromatic Bed," which I had seen with other descriptions all using the word "Bed." My wife said, "Why don't you use the word 'Wonder' bed?"

I said, "Wonderful."

So I gave that suggestion to my advertising agency, and they said, "Well, it sounds all right."

Q. Now, at the time you made that decision, were you familiar with the Bell Manufacturing Company? Had you ever heard of them?

A. Yes, I had heard of them, and I knew generally the fact that such a company existed.

Q. Did you know they were making a specialty chair?

A. Yes, I would have known, if someone asked me, that they were making specialty chairs.

Q. Did you have any knowledge of their claim of a trade-mark by name of "Wonder Chair"?

A. No. [59]

Q. You had never seen the trade-mark "Wonder Chair"?

(Testimony of Charles Kunzelman.)

A. I undoubtedly saw it, because I saw some of their ads; but it never registered to the point that I associated that word with them in any way, shape or form.

Q. In other words, whenever you read one of their ads, or whatever knowledge you had at that time, "Bell" was the trade-mark they were using, and "Bell" is what you remembered?

A. Well, "Wonder" is such a common word, I would say, referred to as "wonder drugs" and "wonder this" and "wonder that," I didn't particularly associate that with anything, I mean, except "Wonder Bread."

Q. I show you now an advertisement which at the top carries the notation, "Jan. 14—Sat. Eve. Post," and ask if you can identify that?

A. Yes, I took that off a Saturday Evening Post.

Q. Why did you take it out of the Post?

A. As a sample of another use of the word "wonder."

Mr. Lyon: I will offer that as defendants' exhibit next in order.

The Clerk: Defendants' Exhibit I.

(The document referred to, marked Defendants' Exhibit I, was received in evidence.)

Q. (By Mr. Lyon): After you had adopted the advertisement of the type of Defendants' Exhibit E, for what period of time did you continue the use of that particular type of ad [60] format, with

(Testimony of Charles Kunzelman.)

"The Wonder Bed" and "The Bed of Tomorrow for Your Comfort Today" on it?

A. The last that I had used it, from the standpoint that I had anything printed with that type of ad on it, was approximately August or September of last year, of 1955, at which time my advertising agency got up some new ads, and I used those.

Q. I show you now Defendants' Exhibit A and ask when that particular ad was adopted?

A. In approximately August or September of 1955.

Q. In other words, your advertising agency advised you that the ads of the prior types of ad had expended their usefulness and it was time to adopt a new format for your ad to describe new and different properties of your device?

A. That is right.

Q. As a result of which you adopted the ad you have in your hand now, and started using the phrase, "The Electromatic Bed"?

A. That is right.

Q. How did you hit on the phrase, "The Electromatic Bed"?

A. As I mentioned before, that was one of the phrases that I originally contemplated back before we adopted the use of the phrase, "The Wonder Bed," and it was also my advertising man came up with it himself at this time, based upon the [61] fact that, of his knowledge given to him through myself and Kay Randall and others, that some people seeing the advertisements failed to grasp the

(Testimony of Charles Kunzelman.)

fact that it was electrically controlled. So that was an effort to get across that idea. In other words, we are still retaining the "Bed" to make them realize it was a bed, but we substituted the word "Electromatic" as a basis of getting across the idea, which sometimes people who have come in and called us did not realize, that the bed was electrically controlled. They may have jumped to the conclusion that it was a hospital bed you had to crank.

Q. So you substituted this descriptive language for the descriptive language in the other ad?

A. Yes.

Q. The phrases "The Wonder Bed" and "The Bed of Tomorrow for Your Comfort Today"?

A. Yes, that is right.

Q. I recall, Mr. Kunzelman, that you have about, or had about three billboards carrying your Sleeper Lounge ad at one time. A. That is right.

Q. Do you have any of those ads at the present time?

A. The payment of them has been stopped by me. The contract ran out in October or November of 1955, at which time two of them were taken down, and I believe there is one which [62] is still standing—at least, it was the last report I had. Somebody mentioned to me a couple of weeks ago that it was still out there. But that is apparently because they had not resold that billboard to somebody else, and are just leaving it up.

Q. So that you have no control over that billboard or what is on it or how long it stays there?

(Testimony of Charles Kunzelman.)

A. No. I suppose—I don't know—I might be able to demand that they take it down. But, I mean——

Q. Now, in the Sleeper Lounge offices, who is normally present?

A. Kay Randall is there most of the time.

Q. And yourself, occasionally, when you have the time?

A. Myself occasionally, my wife on occasion, and then other times other people.

Q. Now, when, let's say, a letter comes in directed to your organization—well, has your organization ever received any correspondence directed to the Bell Manufacturing Company on it?

A. No.

Q. Has your organization ever received any letters which referred to a "Wonder Chair"?

A. No, sir.

Q. Or a "Wonder Bed," to your knowledge?

A. To my knowledge, relayed to me by Kay Randall when [63] I asked her, she said that a few letters, in the body of the letter, did mention in some way "your Wonder Bed" or something on that order. In other words——

Q. In other words, they would say "your Wonder Bed," using it to describe the product they were inquiring about? A. That is right.

Q. I will show you a letter and ask if you can identify the same?

A. I never have seen this particular one before, but that is a letter—seems to be a copy of a letter

(Testimony of Charles Kunzelman.)

of the type that she does write the customers; that is the type of description she gives in her letters.

The Court: Do you want to make that an exhibit?

Mr. Lyon: Let me ask this:

Mr. Elliott, I can call Miss Randall and have her identify the fact that this is a letter that they send out, if you desire. If you want to admit it in evidence for that purpose, then I won't have to call her.

Mr. Elliott: It can be admitted, with a statement to the effect, as far as I am concerned, that it is dated January 21, 1956. Whether or not this is the letter she always send out or not, I don't know, but here is a letter dated January 21st.

Mr. Lyon: I had better call Miss Randall and have her identify it. [64]

The Court: Is she here?

Mr. Lyon: She will be here at about 11:00 o'clock, your Honor.

The Court: All right.

Q. (By Mr. Lyon): In the course of the selling of these products, Mr. Kunzelman, you personally have transacted all of the business—I mean, you have answered the phone, you have answered letters, you have talked to people who come through the door, and negotiated the sales yourself?

A. Yes, sir.

Q. Have you ever received any phone calls of any nature wherein the Bell Manufacturing Company was referred to by the purchaser?

(Testimony of Charles Kunzelman.)

A. No, sir.

Q. Did you ever talk to any customer who came into the door in which the Bell Manufacturing Company was ever referred to? A. No, sir.

Q. Have you ever, in your association in this business, had anybody who was interested in purchasing one of your devices mention the Bell Manufacturing Company?

A. I don't recall any such incident.

Q. Has anybody ever mentioned "The Wonder Chair"? A. No.

Q. Has anybody ever called your product other than [65] by the term "Sleeper Lounge" or "Sleeper Lounge the Wonder Bed," I mean, when they give it a name other than calling it "The Wonder Bed"?

A. Well, I mean, in other words, as far as apart from—I mean, they may have referred to it, I mean, not knowing just what—I mean, at some of the shows we have shown at, somebody might come along and say, "What's this?" But where they have called it something else, in overwhelming instances they have referred to it as "Sleeper Lounge." In just a very few instances they have mentioned "your Wonder Bed."

Q. What is the principal type of customer that you have for this item—or types?

A. Well, we have at this time the—our customer clientele would be largely in two different categories: No. 1, people who are fairly well off finan-

(Testimony of Charles Kunzelman.)

cially so that three hundred dollars does not seem too much for them to pay for a bed.

Q. Could you identify a few such type of customers?

A. Yes. There are celebrities such as Harpo Marx, Lee De Forest, the father of radio and television; Mr. Kindelberger, the President of North American Aviation; Mr. Snyder, vice-president of Chrysler Motors——

The Court: A little louder. I can hear you, but I don't know whether counsel can hear you. [66]

Mr. Lyon: Well, that is enough.

Q. What are the other class of customers to whom you sell?

A. People who have some form of disability or illness, to which this ministers in some way; not necessarily people who are laid up, but people who have back trouble or leg trouble or heart trouble or something of that nature, so that they have more urgency. As I stated before, people usually, because of the price, take a long time to make up their mind in buying this product, unless, as I say, No. 1, they have either enough money so that it doesn't matter much to them, or, No. 2, they have some disability so that the relief of pain or what not—so that they have more of an urgency so as to not take too long for them to make up their mind in connection with the matter.

Mr. Lyon: That is all I have for the present, your Honor.

(Testimony of Charles Kunzelman.)

The Court: We might stop and take the recess.

(Recess.)

The Court: We will have the witness resume the stand.

Cross-Examination

By Mr. Elliott:

Q. Mr. Kunzelman, have you personally observed, controlled and planned, together with your advertising firm, the [67] layout of your advertisements? A. Yes, I have.

Q. But you do not believe in false, misleading advertising, do you? A. I certainly do not.

Q. You mentioned that you sell a substitute for a box spring and mattress, and I believe you also mentioned that you sell a box spring and mattress. Could you clarify that?

A. We have a substitute for—Let's put it this way: What we have is a substitute for an ordinary box spring and mattress.

Q. Can you structurally define the product you sell? I am still confused.

A. Our product is something which takes the place of an ordinary box spring and a mattress, except it has a mattress in connection with it, it has springs in most cases, and it has two motors by which one can actuate that mattress to go into any desired contour position, resting position.

Q. Would I be describing it correctly if I said that it had a deck or frame, in which was enclosed a mechanism and on which was disposed a mattress?

(Testimony of Charles Kunzelman.)

A. That is fairly close.

Q. Is that an accurate description?

A. That is fairly accurate, yes.

Q. Is there any conventional furniture term which [68] could be applied to your product?

A. No, because it is an entirely new product. We run across that. Even in shipping, we have to come in under a misapplication because there is nothing existing which describes that product.

Q. For what purpose is your product designed to be used?

A. I should think that would be fairly obvious. To enable people to get into certain positions without resorting to the makeshift of piling pillows or not being able to achieve it at all.

Q. So that there is no particular word that can be used to describe your product? If somebody were to ask you what kind of product you made, you couldn't tell them?

A. No, I wouldn't say that.

Q. Could you tell me what the word is, then, or the combination of words?

A. I could express that in a number of different ways, I mean, and I do constantly, I mean, to people. I could say, "Electrically actuated box spring and mattress." I mean, I could describe it in a number of different ways. There is no one word I could describe it. I don't know of a single word. If I could describe it with one word, I would use that as a trade-mark, but I haven't found any one word.

(Testimony of Charles Kunzelman.)

But there are many different phrases by which you could describe it. [69]

Q. You say if you could describe it with one word, you would use it as a trade-mark. You mean there are no two words you can use to describe it?

A. Not fully. That is what we ran across with "Sleeper Lounge"; it didn't fully describe it. So that we have further added to those in a descriptive sense, to further clarify what it is.

Q. "Sleeper Lounge" describes it partially, anyway?

A. That is right. You can sleep in it and you can lounge in it.

Q. Is it possible that your product, with a suitable covering, might be used in a den or living room?

A. Yes, it could be, but we haven't sold it with such covering. We have never sold it as living-room furniture. If anybody wants to do that, they have to re-cover it themselves. We have only sold it with mattress ticking.

Q. Would you say that was one of the features of your product, though?

A. We have never stressed it in any way, shape or form. There are many features. There are other types of uses that we might go out in the future. For instance, for institutional use, hospitals, hotels —could be used in living rooms as a studio, but in a living room it would have to be covered with material similar to this, upholstering material, and it

(Testimony of Charles Kunzelman.)

would then become a studio couch. A studio couch is different [70] from a chair.

Q. If you were to drape a blanket over it, would it appear like a studio couch, in one position?

A. Like a studio couch? Yes, it might appear like a studio couch if you were to drape it in a certain way.

Q. If you were to put sheets on it, and a pillow, would it appear like a Hollywood bed?

A. Yes.

Q. What kind of a product would you describe as a "contour chair"?

A. What kind of product? You mean, how would I describe a contour chair?

Q. How would you describe a contour chair?

A. Well, a contour chair is a chair which has a contour in it.

Q. Has a contour in it? Do you believe your product has any of the features of a contour chair?

A. There are many things that have features of a contour chair, yes. Our bed can assume a position similar to a contour chair, but it can also assume others. In other words, it is—we don't describe it as a contour chair.

Q. So that when you stated earlier in your testimony that your product could not assume the position of a chair, you did not mean that it could not assume the position of a contour chair? [71]

A. No, I did not include a contour chair in that. I talked about a chair in which your feet rest on the ground, similar to this chair here.

(Testimony of Charles Kunzelman.)

Q. Do you believe a purchaser of a contour chair could use your product to fulfill his requirements or some of his requirements?

A. We have many people who have a contour chair, who have bought our bed. In other words, there is nothing—I don't quite understand the question.

Q. In other words, they bought your bed because they liked to rest in it? A. Yes.

Q. Have their body in contour?

A. That's right. They found the value of that position, and then they wanted it in more places than just in their living room.

Q. Do you believe your product could be used as a reclining chair?

A. No. Well, as I say, the only thing that—the only possible use that you could ever make of our bed as a piece of living-room furniture is as a studio couch. It is not a chair. In other words, a chair is something, I mean, which looks like that (indicating). It has an upright back and has a place to put your feet to sit in it.

Q. You say a chair has an upright back? [72]

A. That is, generally speaking. I mean, it has more or less. Let me amend that, then, to say that it has a back in a more or less upright position.

Q. What do you mean, "more or less"?

A. Well, I think the answer is fairly close. It should suffice, unless you are just quibbling in the matter.

Q. I don't want to quibble.

(Testimony of Charles Kunzelman.)

To what maximum angle does the back of your product achieve towards the upright?

A. Approximately 80 degrees.

Q. Approximately 80 degrees. Do you think that is more or less upright? A. Yes.

Q. So that from that aspect your product converts to a position having that feature of the chair —in other words, it has a back that is more or less upright?

A. You might say a horse is similar to a man because he has legs. In other words, that is part of it. In other words, not as far as the whole product is concerned. The back goes up, but the foot doesn't go down so that you can put your feet on the ground.

Q. Do you feel that is a requirement of a chair?

A. My interpretation of what a chair is, yes, and a common interpretation that the public would assume.

Q. Can you sit on your product? [73]

A. As you would on a davenport or studio couch or bed; not as you would in a chair.

Q. But it does have a back so you could sit on it?

A. No, it doesn't have a back.

Q. It doesn't have a back? A. No.

Q. In other words, when you adjust it and bring that thing up——

A. It doesn't have a back. In other words, you are creating a back from a lying position. That is a different deal. In other words, if you put——

Q. Let me ask you this question: If this cushion

(Testimony of Charles Kunzelman.)

were not separable but instead were part of this back, would this still be a chair? I am referring to Plaintiff's Exhibit 1.

A. How is that again?

Mr. Elliott: Would you please read it?

(The reporter read the pending question.)

Mr. Lyon: I wonder what the purpose of all this is. I don't see the relevancy of the defendant's interpretation of "a chair" in this instance. The only thing that is important is whether the plaintiff used it in his trade-mark registration.

The Court: This is cross-examination. I will permit some latitude.

You may answer. [74]

I will overrule the objection.

The Witness: I would say, if you took that cushion away from the particular chair, it would still be a chair, yes.

Q. (By Mr. Elliott): So that it is not a criterion of defining the chair that the cushion is separable from the back, or that the back is separable from the seat cushion, or——

A. I did not make that definition. You misunderstood me, if you think that I made such a definition.

Q. Can you recline on your product?

A. What is your interpretation of "recline"?

Q. Well, I am not an expert in furniture, so——

A. That is what I would like to ask you. In

(Testimony of Charles Kunzelman.)

other words, if you are getting technical, then I want to know exactly what you mean by "recline."

Q. I am reclining now (demonstrating).

A. We can't do that on ours, no, because you have your feet on the floor.

Q. I am reclining now (demonstrating).

A. Now, do you mean, can I get into that same position?

Mr. Lyon: May the record have some indication of what the attorney for the plaintiff is doing?

The Court: Yes. For the record—— [75]

Mr. Elliott: Yes, for the record, I had positioned myself in Plaintiff's Exhibit 1 with my feet on the floor, and thereafter I positioned myself in Plaintiff's Exhibit 1 with my feet elevated.

The Witness: You cannot do that same thing with the Sleeper Lounge. You can't sit down and from that sitting-down position recline back. In other words, you have to lie down first. In other words, you assume the position of lying in bed. Then you can raise your feet or the back.

Q. (By Mr. Elliott): Let me ask you this, then: It is possible with your product to angulate the feet and angulate the back; is that not correct?

A. That is possible in lots of products, from the standpoint of angulating.

Q. I am asking about your product.

A. Yes.

Q. You can angulate the feet?

A. If you mean by "angulate" coming away from a horizontal position——

(Testimony of Charles Kunzelman.)

Q. I am going to the blackboard and show you what I mean.

You will excuse my rough sketch, but I am trying to illustrate your product as including a mattress and a base structure. A. That is right. [76]

Q. I am trying to illustrate it in another position where the back has been angulated upward and forward. A. Yes, that can be done.

Q. Can that be done with your product?

A. Certainly. We state it in every one of our pictures, that it goes into that position.

Q. When your product is disposed in that second position, with the back angulated upward and forward, would you say a person would be reclining in your product?

A. Not in the sense that you apparently are driving at. In other words, from the standpoint if you are trying to compare reclining in a chair with reclining on that bed with the back up—in other words, if you can be said to be reclining in a hospital bed, if that is what you mean by "reclining," then—in other words, a position similar to what you achieve in a hospital bed, yes, you can recline. But from the standpoint of reclining in a chair, which you are trying to draw a parallel to——

Q. I am trying to draw a parallel, yes.

A. In other words, in that sense, no. In other words, there is very definitely a distinction between that bed, on which your feet never go down and rest on the floor, and something like this, which is primarily a living-room piece of furniture which

(Testimony of Charles Kunzelman.)

purports to be a chair except when it converts into a bed, which is an entirely different type of [77] thing.

Q. I am not at this time discussing the respective structures. I am only discussing how they are used. Let me ask you a further question:

Would you say that a chaise lounge is a bed or a chair?

A. I don't know. I am not particularly acquainted with a chaise lounge. I have never made a study of them. I am not an expert on that subject.

Q. But you have been in the furniture business since 1946?

A. Yes, but I have never sold a chaise lounge.

Q. You wouldn't say it is a bed or it is a chair?

A. It has some features, of course——

Q. Would you say your product has some features of a bed?

A. No, I wouldn't—Of a bed, yes; but it has no features of a chair.

Q. In other words, you can't sit in it?

A. No, not in the sense that you can sit in a chair; no, sir.

Q. The only distinction——

A. You could sit on it in the same way you can sit on your bed, that is, with having no support for your back.

Q. Could you lean your back up?

A. Then you are different, then you are not sitting on [78] it; then you have lain down on the bed and brought the back up.

(Testimony of Charles Kunzelman.)

Q. I am sorry, I guess I haven't made myself clear. Let's put an individual in the product (drawing on the board).

A. He is not now sitting.

Q. He is not sitting? A. No.

Q. Can you tell me what he is doing?

A. He is lying in bed. (A pause.) That's a fact. It's a bed. He is lying in it. If you put pillows behind you on the bed, are you sitting or lying flat?

Q. I would say you're sitting.

A. That is a difference of opinion. I would say you are still lying in bed. That is a difference of opinion.

Q. But you are in a sitting position, is that correct; when the back of your product is raised upward and forward, and the person is disposed in your product, is he in a sitting position?

Mr. Lyon: I would like to object to that as being repetitive. It is merely argumentative now.

The Court: Yes, I will sustain the objection.

You have covered that.

Q. (By Mr. Elliott): Can you lounge on your product? A. Yes.

Mr. Lyon: I will make the same objection; that we have [79] already covered that territory.

The Court: Well, I will let his answer remain. He said "Yes."

Didn't you?

The Witness: Yes.

Q. (By Mr. Elliott): You can lounge on your

(Testimony of Charles Kunzelman.)

bed. Can you tell me what the word "lounge" means, in furniture terms?

A. No, I can't. I have no particular definition. I mean, I never looked it up.

Q. What does it mean to you?

A. It means, as related to our product, in which I have thought of it in terms, it means lying in the bed in a comfortable position.

Q. When did you start using the phrase "Wonder Bed"?

A. Some time in 1954. I don't remember now from memory exactly when it was; somewhere along about the middle of the year.

Q. How soon after you started using the phrase "Wonder Bed" did you receive, or approximately how soon after did you receive a notice of plaintiff's registered trade-mark?

A. As I recall, fairly soon. I would say it was within a month after we had first published some ads.

Q. You stated that you were involved in several other activities and that the defendant company, Sleeper Lounge Company, was sort of a sideline; is that correct? [80]

A. It is. I am engaged—I am president of another company, to which in this past year I have devoted the greater bulk of my time. In other words, I have devoted somewhat less than 50 per cent of my time to Sleeper Lounge, and somewhat more than 50 per cent to my other company.

Q. And of that somewhat less than 50 per cent

(Testimony of Charles Kunzelman.)

of your time, how was that time devoted, just generally? In other words——

A. Well, devoted to a little of everything. I have personally spent a lot of time at each one of our shows. I have been at the store at various times. I have been in conference with advertising people. I have done various different things: all the executive functions, sign the checks, paying the bills, supervising the work, and——

Q. Well, if you were to say, of that less than 50 per cent, how much of your time was devoted to actual personal selling of your product?

A. That has varied. There have been times when I devoted quite a bit of time to it, and then there were other times there might be weeks or a month or two go by in which I did none. But I mean there have been periods of time when I did it quite intensively and saw lots of people and talked to lots of people and made a lot of sales myself.

Q. You stated in your earlier testimony that your advertising men just changed from the first form of advertising to [81] another form in which they used the word "Wonder," and in connection with the reasons you stated as your first reason that it was for educational purposes; is that correct?

A. As far as the bed is concerned, using a phrase which had "bed" in it, yes, because I stated that some——

Q. What about the word "wonder"?

A. Well, no, that didn't enter into it. That was merely another descriptive word. In other words,

(Testimony of Charles Kunzelman.)

we were not trying to educate the people on "wonder." We were trying to educate people and get the idea across that in every case they would realize it was a bed.

Q. So that, of those two words, "bed" was the real heart of it?

A. Yes, "bed" is the real heart of it, that is right. In other words, that is the word that we wanted to stress.

Q. Because that told them what kind of product you were selling?

A. That is right. In other words, that it was—so that people would not think it was the type of lounge that was other than a bed.

Q. I show you Defendants' Exhibit E, which is a brochure in connection with your product, on the back side of which are listed five features of your product. Will you kindly read the third feature (handing document to the witness)? [82]

A. "Sleeper Lounge is available in any bed size from twin to king. It will fit Your bed Stead or may be used as a Hollywood Bed or Studio Couch. The superb mattresses by custom builders Thorpe & Draper are available in innerspring or foam rubber, in any desired firmness. The specially constructed innerspring mattresses are fully guaranteed for 10 years, the foam rubber for 20 years."

Mr. Elliott: We have a catalog page describing one of plaintiff's products. May that be plaintiff's exhibit next in order, your Honor?

The Court: All right.

(Testimony of Charles Kunzelman.)

Mr. Lyon: May I ask when that was published?

Mr. Schapp: First in 1947.

The Clerk: Plaintiff's Exhibit 19.

(The document referred to, marked Plaintiff's Exhibit No. 19, was received in evidence.)

Q. (By Mr. Elliott): Mr. Kunzelman, I show you Plaintiff's Exhibit 19 and Plaintiff's Exhibit 17. In Plaintiff's Exhibit 17 there is shown a woman disposed on a furniture product. In Plaintiff's Exhibit 19 there is shown a woman disposed on a furniture product.

The product shown in Plaintiff's Exhibit 17 is the product of your Sleeper Lounge Manufacturing Company.

The product shown in Plaintiff's Exhibit 19 is the product of the plaintiff in this action. [83]

Can you tell me the difference in the position the woman is disposed in, in each of these exhibits?

A. Well, there is some slight difference. I mean——

Mr. Lyon: Your Honor, I think the documents speak for themselves. I don't see any reason why——

Mr. Elliott: Mr. Kunzelman is an expert in furniture, your Honor.

Mr. Lyon: He has not been qualified as an expert in furniture. He has been qualified as a man who has been in the business.

The Court: You may answer, Mr. Kunzelman.

The Witness: The position that the people are in

(Testimony of Charles Kunzelman.)

is somewhat similar. I am not contending in any way, shape or form that you could possibly get into the same position on this chair as you can in our bed. You can get into the same position in a lot of different things. There are a million products in which you can get into the same position. I mean, you have no patent on the position.

Q. (By Mr. Elliott): We agree with you; we don't have a patent on the position. You are entirely right. So that you would say, then, that the difference between the products is the manner in which you achieve the position?

A. It is more than that. It is a lot more than that.

Q. But at least, as between these two exhibits, that is the only—— [84]

A. You have one in which you have somebody in somewhat the same position as you have in there. I mean, you have that, and that is all you do have.

Mr. Elliott: We have no further questions, your Honor.

Redirect Examination

By Mr. Lyon:

Q. Mr. Kunzelman, to your knowledge, has anybody purchased one of your devices as a substitute for a chair? A. No.

Q. Has anybody ever purchased one of your devices, to your knowledge, for use as a living-room piece of furniture?

A. Yes, as a studio couch.

(Testimony of Charles Kunzelman.)

Q. As a studio couch? A. Yes.

Q. But not as a chair?

A. Not as a chair.

Mr. Lyon: That is all.

The Court: That is all. You may step down.

Mr. Lyon: Miss Randall, will you take the stand, please?

KAY RANDALL

called as a witness on behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: State your name, please. [85]

The Witness: Kay Randall.

Direct Examination

By Mr. Lyon:

Q. What is your present occupation, Miss Randall?

A. I am employed as—well, I have often wondered, if I may say so. I do the sales work and I do the small amount of bookkeeping—of course, Mr. Kunzelman oversees the major portion and the banking and the general business of the office.

Q. In other words, you are the employee of the Sleeper Lounge Company? A. That is right.

Q. Do you answer the mail that comes to the organization? A. All of it, I would say.

Q. Do you answer the telephone calls?

A. That is correct.

(Testimony of Kay Randall.)

Q. Except when Mr. Kunzelman happens to take the phone? A. Yes.

Q. Do you service the customers who come in through the door? A. I do, indeed.

Q. When you receive inquiry by mail or inquiry by phone, requesting information concerning your product, do you send any kind of response? [86]

A. Yes, I have typed up a little form letter that Mr. Kunzelman has approved of.

Mr. Lyon: Will you mark that as defendants' exhibit next in order, please?

The Clerk: Defendants' J.

(The document referred to was marked Defendants' Exhibit J for identification.)

Q. (By Mr. Lyon): I show you a letter identified as Defendants' Exhibit J, and ask you if you can state what that is.

A. This is a letter that I send out. The only deviation ever made from this letter—this is the basic letter, understand—is if a person asks some specific question pertinent to their particular need, in which case I elaborate in a small sense.

Q. When did you first send out a letter in this form? Do you recall?

A. Oh, I have been using that letter approximately for about a year.

The Court: Do you want to make it an exhibit now?

Mr. Lyon: Yes, I would like to offer this in evidence, your Honor.

(Testimony of Kay Randall.)

The Court: All right, it may be received as the next exhibit.

The Clerk: Defendants' Exhibit J. [87]

(The document referred to, marked Defendants' Exhibit J, was received in evidence.)

Q. (By Mr. Lyon): Prior to the use of this letter—you used this particular form during 1955?

A. That is correct. Maybe a different phraseology and a different price, you see, and everything, but the basic part of the letter is exactly the same.

Q. Prior to the adoption of this particular form letter, what type of communication did you send out? A similar type of letter?

A. Oh, yes; similar type.

Q. Did any of the letters you have ever sent out in response to an inquiry ever use the word "Wonder"? A. Positively never.

Q. During the time that you have been on duty in the Sleeper Lounge Company by way of answering mail, phone calls, letters, has anybody ever referred to the Bell Manufacturing Company?

A. Never once—never.

Q. Has anybody ever used the phrase "Wonder Chair"?

A. No one who ever entered my shop and has asked to see our Sleeper Lounge has ever mentioned the word "Wonder" in any way.

Mr. Lyon: That is all, Miss Randall. [88]

(Testimony of Kay Randall.)

Cross-Examination

By Mr. Elliott:

Q. Miss Randall, you state that during the year 1954 you sent out similar letters to the——

A. That is right, sir.

Q. ——Defendants' Exhibit J?

Is this the only type of letter you ever sent out?

A. No.

Q. Or similar to this?

A. It was very similar in word structure. The only deviation, as I said before, was perhaps some particular question a person would ask in regard maybe to a certain illness they might have or some particular need, in which case I would elaborate a bit. Structurally, it would remain practically the same.

Q. Have you ever sent out a printed letter?

A. Let me think about that. Printed letter? Not I, myself, no.

Q. But you are the one who answers all the mail? A. Yes, that is right.

Q. And how long have you been answering all the mail?

A. Well, ever since the company was organized, two and a half years ago—approximately two and a half years. I think it lacks about six weeks.

Q. Would you say, then, that neither the printed letter [89] nor a typed letter has ever been sent to any customer in which the word "Wonder" is used.

(Testimony of Kay Randall.)

A. Oh, yes, that I can answer emphatically; the word "Wonder" has never been used in a letter of any kind that has gone out from the office.

Q. As part of the brochure?

A. Yes, we had a brochure in which the word "Wonder" was employed.

Q. Was there a letter in that brochure?

A. No. The brochure would be included in many instances.

Mr. Elliott: I have here a piece of printed matter put out by the Sleeper Lounge Company, which I would like to have identified as plaintiff's exhibit next in order.

The Court: All right.

The Clerk: Plaintiff's Exhibit 20.

(The document referred to was marked Plaintiff's Exhibit No. 20 for identification.)

Q. (By Mr. Elliott): Miss Randall, have you ever seen this printed matter, Plaintiff's Exhibit 20, before? A. Yes, I have.

Q. Have those ever been used by you?

A. Let me think. I believe that this is the letter that was sent out at Christmas time. Would this comprise a printed letter? I mean, I didn't regard it as such. When I made that statement, I didn't recall. If that is in your [90] mind——

Q. I don't know how else you would describe it. Maybe you can tell me how you would describe it.

A. Well, "printed letter" means to me exactly a

(Testimony of Kay Randall.)

printed letter. I regard this as an advertising brochure.

Q. Is it written in letter form? A. Yes.

Q. Is it signed "Very sincerely yours"——

A. Yes.

Q. ——"by Sleeper Lounge Company"?

A. Yes. But I don't regard that as a letter. I regard that as an advertising brochure that was sent out to the Christmas trade.

Q. Is the word "Wonder" used in this letter, incorporated in this brochure?

A. Yes, it is. I see it here.

Q. Is it used prominently in the advertising matter accompanying the letter? A. Yes.

Mr. Lyon: I object to that, your Honor. That calls for a conclusion of the witness, unless we have some definition of what he means by "prominent."

The Court: I will let her answer. I will overrule the objection. I will allow the answer to remain.

Q. (By Mr. Elliott): Your answer is [91] "Yes"? A. Well, yes, I think so.

Mr. Elliott: I have no further questions, your Honor.

Mr. Lyon: I have no further questions.

The Court: You may be excused.

Mr. Lyon: The defense rests, your Honor.

The Court: The defense rests.

Do you have any further testimony?

Mr. Elliott: I think we had better have this entered.

The Court: All right, it may be received.

The Clerk: Plaintiff's Exhibit 20.

(The document referred to, marked Plaintiff's Exhibit No. 20, was received in evidence.)

Mr. Lyon: There is only one matter, your Honor —the chair, Exhibit 1 has been admitted for the purpose of illustration only.

The Court: Yes.

Mr. Lyon: There is nothing in the record as a substitute for it. I want to call that to the plaintiff's attention.

The Court: We have just the testimony about the chair. We didn't know how to handle this chair.

Mr. Lyon: I wonder if they intend to put in any drawings or photographs as a substitute?

The Court: Well, we have the photographs in already.

Mr. Elliott: Yes.

The Court: I was going to ask Mr. Elliott to arrange [92] with his men to come and get the chair.

Mr. Elliott: Yes, your Honor.

The Court: Do you rest, too?

Mr. Elliott: Yes, we do, your Honor.

The Court: All right. I will take the matter under submission.

You have made statements, and I have the argument. Is there anything more anybody wants to say or do?

Mr. Lyon: I would like to make one observation, your Honor, that I did not know before, and if I may take a moment of your time.

The Court: Certainly.

Mr. Lyon: The trade-mark asserted by the plaintiff in this action is "Wonder Chair." Their own expert witness, Mr. Brown, on the stand testified with respect to every advertisement they have put in evidence that the trade-mark in use was the the word "Bell." Consequently, as far as this record is presently concerned, there is no evidence whatsoever of any trade-mark use of the words "Wonder Chair" by the plaintiff. Consequently, I believe that the registration was invalidly issued. I don't mean by that to purport that anybody filed any false affidavits or anything else. I believe each of the gentlemen whose signatures appear on the document believed what they were purporting to swear to. However, I think an error of law was made on their part in filing the application, [93] and I believe in filing their affidavits in support of the incontestability of their registration. Their own witness, their own expert has testified that the trademark they are using is "Bell," not "Wonder Chair."

That is all I want to point out.

The Court: All right, Mr. Elliott and Mr. Schapp, I have heard from you extensively and I have your trial memoranda. Is there anything more you want to say?

Mr. Elliott: There is one point I would like to bring out, your Honor.

The Court: Certainly.

Mr. Elliott: Without going to the merits of the case at all, Mr. Lyon in his opening statement referred quite extensively to the Lanham Trade-mark Act, which, after all, plays a very considerable part

in your decision, and Mr. Lyon made certain remarks which I would like to refute to a certain extent so that that doesn't stand entirely alone in the record.

Mr. Lyon stated that Daphne Roberts, who is now Daphne Reed, Assistant Commissioner of Trademarks, in charge of the Trade-mark Division, had set forth or given the viewpoint that the 1946 Act was purely procedural and did not change the substantive law in any respect. Mr. Lyon further stated that this had been the general feeling among attorneys and the like.

I don't agree with that contention, and I refer your Honor to the commentary of Daphne Roberts in 15 U.S.C.A. at [94] page 265, in which on two occasions she has stated that the Act creates substantive rights in the registrant.

I also refer you to a further provision of her commentary in which she states, "The prohibition against registration of geographical names, descriptive words, and surnames is also relaxed."

That is all I have to say, your Honor.

The Court: I will take the matter under submission, then.

Mr. Elliott: Thank you.

The Court: Mr. Elliott, how are you going to get your chair out of here?

Mr. Elliott: We will have to call the deliveryman. We will take care of it, your Honor.

(Discussion off the record.)

Mr. Elliott: I wonder whether any additional briefs would be in order, your Honor?

The Court: You have filed quite extensive pretrial memoranda, and I have the pretrial and I have heard the case. I don't think so.

Mr. Elliott: Fine.

The Court: Thank you. [95]

[Title of District Court and Cause.]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing 95 pages comprise a true and correct transcript of the portions of the proceedings as noted, had in the above-entitled cause on January 25 and 26, 1956, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of March, A.D. 1956.

/s/ JOHN SWADER,
Official Reporter.

[Endorsed]: Filed March 19, 1957.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled cause:

A. The foregoing pages, numbered 1 to 158, inclusive, containing the original:

Complaint;
Answer to Complaint;
Interrogatories to Be Answered by Defendant;
Notice of Objection to Interrogatories;
Answers to Interrogatories by Defendants;
Plaintiffs' Memorandum in Opposition to Defendants' Objections to Interrogatories;
Interrogatories Directed to Plaintiff;
Order on Objections to Interrogatories;
Answer to Interrogatories by Plaintiff;
Defendants' Answer to Interrogatories;
Defendants' Pretrial Memorandum;
Plaintiff's Pretrial Memorandum;
Proposed Pretrial Order;
Plaintiff's Trial Memorandum;
Defendants' Trial Memorandum;
Plaintiff's Closing Brief;
Defendants' Answering Brief;
Ex Parte Order;
Plaintiff's Reply Brief;

Objections to Proposed Findings of Fact and Conclusions of Law;

Findings of Fact and Conclusions of Law;

Notice of Appeal;

Order Extending Time to Docket Record on Appeal;

Defendant's Designation of Contents of Record on Appeal;

Order Extending Time to Docket Record on Appeal;

and a full, true and correct of the Minutes for:

April 28, 1955;
August 1, 1956;
January 25, 1956;
January 26, 1956;

B. Plaintiff's Exhibits 1 through 20, inclusive, and Defendants' Exhibits A through J, inclusive;

C. 1 volume of reporter's official transcript of proceedings, January 25, 26, 1956.

I further certify that my fee, amounting to $1.60, for certifying the record, has been paid by appellant.

Witness my hand and seal of the said District Court this 26th day of March, 1957.

JOHN A. CHILDRESS,
Clerk;

By /s/ CHARLES E. JONES,
Deputy.

[Endorsed]: No. 15495. United States Court of Appeals for the Ninth Circuit. Sleeper Lounge Company, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; Charles Kunzelman and James A. Anderson, Appellants, vs. Bell Manufacturing Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed March 27, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15495

BELL MANUFACTURING COMPANY, a Corporation,

Plaintiff-Appellee,

vs.

SLEEPER LOUNGE COMPANY, a Co-partnership Consisting of Charles Kunzelman and James A. Anderson; CHARLES KUNZELMAN and JAMES A. ANDERSON,

Defendants-Appellants.

CONCISE STATEMENT OF POINTS UPON WHICH DEFENDANTS-APPELLANTS INTEND TO RELY UPON APPEAL AND ASSIGNMENT OF ERRORS

(1) The district Court erred in holding that (Findings of Fact 11):

"Defendants, and each of them, have, in interstate commerce, and without the consent of Plaintiff, used reproductions, counterfeits, copies, and colorable imitations of Plaintiff's Trade-mark, Registration No. 377,752, in connection with the sale, offering for sale, and advertising of goods in connection with which such use is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods. In this regard, the Defendants adopted and used the trade-mark

'Wonder Bed' for a lounge or contour bed, which is adjustable for use as a bed, a lounge, and a reclining chair, and employed the trademark 'Wonder Bed' in the sale, offering for sale and advertising of their lounge or contour bed in commerce among the several States. More particularly, the Defendants identified their contour bed or lounge as the 'Wonder Bed' in radio commercials, brochures, on truck-side advertising, on billboards, and in at least fifteen different publications, including the Los Angeles Times, Home Magazine Section, as further identified in Plaintiff's Exhibits 16, 17 and 18. Certain of the publications, including the Los Angeles Times, have wide circulation in a number of states throughout the United States. Further, in connection with the sale of Defendants' contour bed or lounge, Defendants caused a label to be affixed to the goods on which the goods are identified as the 'Wonder Bed.' "

(2) The District Court erred in holding that (Finding of Fact 12):

"The said lounges or contour beds thus sold and distributed by the Defendants are embraced within the product line of goods specified in Plaintiff's Trade-mark Certificate and have substantially the same descriptive properties as Plaintiff's reclining chairs and/or convertible chair beds, and belong to the same Patent Office classification, namely, Class 32 (Furniture and Upholstery)."

(3) The District Court erred in concluding that (Conclusion of Law 1):

> "Plaintiff's trade-mark 'Wonder Chair' as shown on Registration Certificate No. 377,752 is valid and subsisting, uncancelled and unrevoked, and plaintiff is the owner thereof."

(4) The District Court erred in concluding that (Conclusion of Law 2):

> "Defendants have infringed Plaintiff's valid trade-mark 'Wonder Chair' as shown on Registration Certificate No. 377,752."

(5) The Judgment of the District Court errs in adjudging that (Paragraph 1 of the Judgment):

> "That a permanent injunction be granted against the Defendants from further infringement of the valid trade-mark, 'Wonder Chair, owned by Plaintiff."

(6) The Judgment of the District Court errs in adjudging that (Paragraph 2 of the Judgment):

> "That judgment be allowed the Plaintiff in the sum of one thousand dollars ($1,000.00) for damages."

(7) The Judgment of the District Court errs in failing to make any findings of fact whatsoever in support of the allowance of one thousand dollars ($1,000.00) damages.

(8) The Judgment of the District Court errs in that the record is void of any evidence or any attempt to prove damages. Consequently, the award

of one thousand dollars ($1,000.00) damages is without any support in the record.

(9) The Judgment of the District Court errs in adjudging (Paragraph 3 of the Judgment):

> "That the Defendants be ordered to pay attorney's fees to the Plaintiff in the sum of five hundred dollars ($500.00)."

(10) The Judgment of the District Court errs in failing to recognize that attorney's fees per se are not allowable in trade-mark litigation. Consequently, the award of five hundred dollars ($500.00) attorney's fees is erroneous.

(11) The Judgment of the District Court errs in failing to make any findings of fact whatsoever which will support the award of attorney's fees as part of punitive damages.

(12) The Judgment of the District Court errs in failing to make any findings of fact or conclusions of law which would support the award of five hundred dollars ($500.00) as attorney's fees.

LYON & LYON,

By /s/ R. DOUGLAS LYON,
Attorneys for Defendants-Appellants.

Dated this 27th day of March, 1957.

Affidavit of mail attached.

[Endorsed]: Filed March 28, 1957.